[redacted]

Undated

OGC Has Reviewed

Approved For Release 2007/03/08 : CIA-RDP80S01268A000400020044-0

Next 5 Page(s) In Document Exempt

Approved For Release 2007/03/08 : CIA-RDP80S01268A000400020044-0

INTEGRATING GOVERNMENTAL AND OFFICER TORT LIABILITY

GEORGE A. BERMANN *

INTRODUCTION

The legislative and judicial dismantling of sovereign immunity is among the more significant and celebrated reforms of recent American administrative law.[1] In many instances, this development has given those seeking damages for wrongful governmental action their first and only defendant. Even in situations in which litigants already had a cause of action against individual public officials, making the government amenable to suit has enhanced the chances of actual recovery, since officials often lack the means to satisfy judgments rendered against them.[2] The immunity from liability enjoyed by public officials also has undergone a complex series of changes.[3] Though still in flux, this controversial area of the law today finds officials exposed to a considerable risk of personal liability for the wrongs they commit in connection with their performance of duty.

Although these developments might have gone even further in lowering the shield of immunity from the government and its officers, they represent a

---

* Assistant Professor of Law, Columbia University School of Law. B.A., Yale University, 1967; J.D., Yale University, 1971; LL.M., Columbia University, 1975. The author wishes to acknowledge the research assistance of Miroslav M. Fajt, a second-year student at Columbia Law School.

1. *See generally* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES ch. 25 (1976) [hereinafter cited as K. DAVIS, SEVENTIES]; B. SCHWARTZ, ADMINISTRATIVE LAW §§ 198, 200 (1976); Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis*, 9 J. PUB. L. 1 (1960); Cobey, *The New California Governmental Tort Liability Statutes*, 1 HARV. J. LEGIS. 16 (1965); David, *Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit*, 6 U.C.L.A. L. REV. 1 (1959); Jacoby, *Roads to the Demise of the Doctrine of Sovereign Immunity*, 29 AD. L. REV. 265 (1977); Peterson, *Governmental Immunity: Has a Change Finally Come?*, W. ST. U. L. REV. 209 (1975); Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963); Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A. L. REV. 463 (1963) [hereinafter cited as Van Alstyne, *Public Policy*]; Vanlandingham, *Local Governmental Immunity Re-examined*, 61 NW. U. L. REV. 237 (1966).

2. *See, e.g.*, S. REP. No. 588, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2789, 2790.

3. *See generally* Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946); David, *The Tort Liability of Public Officers*, 12 S. CAL. L. REV. 127, 260, 368 (1939); Davis, *Administrative Officers' Tort Liability*, 55 MICH. L. REV. 201 (1956); Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303 (1959); Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610 (1955); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937); Keefe, *Personal Tort Liability of Administrative Officials*, 12 FORDHAM L. REV. 130 (1943); McManis, *Personal Liability of State Officials under State and Federal Law*, 9 GA. L. REV. 821 (1975); Nelson & Avnaim, *Claims Against a California Governmental Entity or Employee*, 6 SW. U. L. REV. 550 (1974); Van Alstyne, *Claims Against Public Employees: More Chaos in California Law*, 8 U.C.L.A. L. REV. 497 (1961); Vaughn, *The Personal Accountability of Public Employees*, 25 AM. U. L. REV. 85 (1975); *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1065 (1977) [hereinafter cited as *Developments*]; Note, *Federal Executive Immunity from Civil Liability in Damages: A Reevaluation of* Barr v. Matteo, 77 COLUM. L. REV. 625 (1977) [hereinafter cited as *Federal Executive Immunity*].

blessing for the victims of official wrongdoing. However, the emerging coexistence of governmental and officer liability has created a new problem of coordination. Without attempting to define the proper scope of liability for harm arising out of governmental activity, this Article explores various aspects of the coordination problem. After briefly sketching recent developments in governmental and officer immunity, and discussing the need for a coherent system of governmental tort law, I shall examine various ways of integrating governmental and officer tort liability so as to accommodate the purposes that the law of governmental torts may appropriately be asked to serve. A brief look will be taken in this connection at the approaches to the problem that have been adopted in French and German law.

I. THE SHIFTING BACKGROUND OF IMMUNITY

A. *The Sovereign Immunity Doctrine*

Although a variety of arguments have been advanced for immunizing the government from suit without its consent,[4] the doctrine of sovereign immunity has been justified on the practical ground that satisfying private claims against the state would cause an intolerable drain on public funds and interfere with the effective functioning of government.[5] However, recent reflection has led to the view that such fears are exaggerated and that in any event asking innocent victims to bear alone the losses inflicted upon them through governmental activity is fundamentally unfair.[6] Today, the cost of compensating for many such losses is regarded as an ordinary expense of government to be borne indirectly by all who benefit from the services that government provides.

By enacting the Federal Tort Claims Act of 1946, Congress made the United States liable "in the same manner and to the same extent as a private individual under like circumstances."[7] However, this general waiver of immunity from tort liability excludes claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[8] Although Congress

4. For historical background of the sovereign immunity doctrine, see Jaffe, *supra* note 3; James, *supra* note 3, at 611-13. According to Justice Holmes, "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

5. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS, 1611-12 (1956).

6. *See id.* at 1612. *See also* Professor Borchard's seminal discussions of sovereign immunity entitled *Governmental Responsibility in Tort: I-VII*, 34 YALE L.J. 1, 129, 229 (1924); 36 YALE L.J. 1, 757, 1039 (1926); 28 COLUM. L. REV. 577, 735 (1928). The availability to public entities of relatively inexpensive liability insurance has greatly eased the transition from immunity to liability.

7. 28 U.S.C. § 2674 (1970).

8. 28 U.S.C. § 2680(a) (1970). The Act also contains an exemption for certain intentional torts. *Id.* § 2680(h).

was willing in principle to have the federal government pay for most of the harm its employees might inflict through garden-variety negligence in carrying out their duties, it sought through this exception to preserve the sovereign's immunity from tort claims arising out of conscious governmental decisionmaking.[9] The courts traditionally have read the exception broadly.[10]

The states have surrendered their sovereign immunity in a bewildering variety of ways. A great many state legislatures have enacted some sort of general waiver of immunity.[11] In most other states, the doctrine has largely been abrogated by the courts.[12] Even in the jurisdictions whose courts have refused, despite legislative inaction, to take matters into their own hands,[13] the shield of common law immunity seems to be perforated with a haphazard collection of narrow statutory exceptions.[14] Although legislative waivers of governmental immunity differ widely from state to state,[15] most state statutes, like the Federal Tort Claims Act, distinguish between discretionary and nondiscretionary acts.[16] Where such a distinction is not explicitly drawn, courts frequently infer it.[17]

Courts on both the federal and state levels have tended recently to reduce the scope of the discretionary acts exception. Some have explicitly rejected the idea that the exercise of a degree of judgment should in itself immunize the government; they would limit the exception to policy decisions that define the public interest in some basic way.[18] The continuing erosion

---

9. *See* 2 F. HARPER & F. JAMES, *supra* note 5, at 1657-58. On the distinction between injury arising through accident and that imposed as a result of the deliberate exercise of governmental authority intended to alter an individual's position, see Jaffe, *supra* note 3, at 212.

10. *See, e.g.*, Dalehite v. United States, 346 U.S. 15 (1953). *See generally* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 370-73 & nn.6 & 7 (6th ed. 1974).

11. *See* K. DAVIS, SEVENTIES, *supra* note 1, at § 25.00-1.

12. *See id.* at § 25.00.

13. *See id.* at §§ 25.00-.00-2.

14. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 975 (4th ed. 1971); Note, *Governmental Tort Immunity in Massachusetts: The Present Need for Change and Prospects for the Future*, 10 SUFFOLK U. L. REV. 521 (1976).

15. Important areas in which statutes differ include the governmental unit exposed to liability, *see, e.g.*, CAL. GOV'T CODE § 815 (West 1966) (all public entities); HAW. REV. STAT. § 662-2 (1968) (state government only); OKLA. STAT. ANN. tit. 11, § 1753 (West Supp. 1978) (municipalities only), the exemptions enjoyed by such units, *see* K. DAVIS, SEVENTIES, *supra* note 1, at §§ 25.00-1, 25.13; B. SCHWARTZ, *supra* note 1, at 568-69, and the ceilings (if any) on the amounts that plaintiffs may recover, *see, e.g.*, MINN. STAT. ANN. §§ 3.736(4), 466.04 (West 1977); N.C. GEN. STAT. § 143-291 (1975); ORE. REV. STAT. § 30.270 (1975). Moreover, some states have established special boards or courts of claims to decide damage claims against the government. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 4-142, 4-160 (West Supp. 1978); ILL. ANN. STAT. ch. 37, §§ 439.1, 439.8 (Smith-Hurd 1972); MICH. COMP. LAWS ANN. § 600.6419 (1968).

16. *See, e.g.*, IDAHO CODE § 6-904(1) (Supp. 1977); IND. CODE ANN. § 34-4-16.5-3(b) (Burns Supp. 1977); N.J. STAT. ANN. § 59:2-3(a) (West 1977); TENN. CODE ANN. § 23-3311(1) (Supp. 1977); UTAH CODE ANN. § 63-30-10(1) (1968).

17. *See, e.g.*, Boucher v. Fuhlbruck, 26 Conn. Supp. 79, 213 A.2d 455 (1965); Charles O. Desch, Inc. v. State, 50 App. Div. 2d 253, 377 N.Y.S.2d 667 (1975); King v. City of Seattle, 84 Wash.2d 239, 525 P.2d 228 (1974).

18. Downs v. United States, 522 F.2d 990, 997-98 (6th Cir. 1975); Griffin v. United States, 500 F.2d 1059, 1064-65 (3d Cir. 1974); Moyer v. Martin Marietta Corp., 481 F.2d 585, 598 (5th Cir. 1973); Breed v. Shaner, 45 U.S.L.W. 2510 (D. Hawaii 1977). *See also* Jones v. State, 33 N.Y.2d 275, 280-81, 307 N.E.2d 236, 238, 352 N.Y.S.2d 169, 172-73 (1973). *But see* Wright v. United States, 568 F.2d 153 (10th Cir. 1977).

of sovereign immunity has greatly enhanced the prospects of recovering damages from the government for the torts committed by its agents. Nevertheless, governmental liability has had its limits and will almost certainly continue to have them. As long as this is the case, plaintiffs will be tempted to join individual officials as defendants in governmental tort litigation if permitted to do so.

B. *Individual Officer Immunity*

Compared to sovereign immunity, the exemption from liability enjoyed by individual public officials has followed a highly erratic course. Over a relatively short period, the law has fluctuated between one extreme solution and another, without settling for too long at any one position. Matters today are still not entirely resolved.[19]

The restlessness of the courts on the question of officer immunity reflects conflicting policy considerations. On the one hand, wrongdoing seems worth deterring or punishing whatever hat the wrongdoer happens to wear. Moreover, there is something anomalous about denying relief to a tort victim simply because he had the added misfortune of being injured by a public official rather than a private citizen. Thus, the common law traditionally did not distinguish between public officials and private individuals for purposes of determining the scope of personal tort liability. In fact, courts that drew such a distinction often imposed a stricter standard of care on officials than on private individuals, holding them personally liable for the consequences of simple non-negligent mistakes.[20]

More recently, however, the courts have recognized that the threat of personal liability may make public officials unduly fearful in their exercise of authority and discourage them from taking prompt and decisive action.[21] This concern, which rests upon the plausible though undocumented assumption that such burdens cannot be imposed upon individual officials without breeding an unhealthy timidity on their part,[22] has led many courts to accord administrative officials at least a qualified immunity that would relieve them of liability for the reasonable and good faith exercise of discretion within the scope of their authority.[23] Limiting immunity to discretionary functions follows from the premise that fear of personal liability can inhibit conduct only when there is room for judgment in deciding whether or how

19. *See Federal Executive Immunity, supra* note 3.

20. *See, e.g.*, Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891) (Holmes, J.). *See generally* W. GELLHORN & C. BYSE, *supra* note 10, at 335-38; Keefe, *supra* note 3, and cases cited therein.

21. *See* Barr v. Matteo, 360 U.S. 564, 571 (1959); Expeditions Unltd. Aquatic Enterprises, Inc. v. Smithsonian Inst., 566 F.2d 289 (D.C. Cir. 1977) (en banc).

22. Justice Brennan, dissenting in Barr v. Matteo, 360 U.S. 564, 590 (1959), described this assumption as a "gossamer web self-spun without a scintilla of support to which one can point."

23. *See, e.g.*, Stiebitz v. Mahoney, 144 Conn. 443, 447-48, 134 A.2d 71, 74 (1957); Vickers v. Motte, 109 Ga. App. 615, 137 S.E.2d 77 (1965); Gildea v. Ellershaw, 363 Mass. 800, 820, 298 N.E.2d 847, 858-59 (1973); Morrill County v. Bliss, 125 Neb. 97, 111, 249 N.W. 98, 104 (1933).

to act.[24] In "
such discretio
effect.[25] At t
immunity to o
of corruption
qualified imm
liability varies

Although
presumed imp
their discretio
considerations
Holding publi
actions may b
officials, unlik
hood of inju
protection, for
some governn
fortunes of th
enable courts
officials from
That these ad
nondiscretiona
courts from c
seems that the
exercise of jud

24. *See gener*

25. *See gener*

26. *See* Barr
(1st Cir. 1975);
(1965); Gregoire
(1950); Cooper v.
similar immunity
denied, 305 U.S. 6

27. *See, e.g.*,
F.2d 1339, 1346 (
amendment violati
can show that the
action). For case
guarantees, see Br
ment); Mark v. C
Apton v. Wilson, 5

28. Frequently
case. *See, e.g.*, Wil
524 F.2d 862, 86
cert. denied, 404 U

29. *See* Van
COMM'N, RECOMM

30. Courts ar
discretion may lat
Scheuer v. Rhodes,
78, 88-90 (1970).
for Police Officers

to act.[24] In "ministerial" matters in which officials are thought to have no such discretion this fear is somewhat naively assumed to have no inhibiting effect.[25] At the federal level, public officials have acquired an absolute immunity to ordinary tort suits which prevents inquiries even into allegations of corruption or malice.[26] However, since federal officials enjoy only a qualified immunity for constitutional torts,[27] their degree of exposure to liability varies with the theory on which the tort claim is based.[28]

Although discussion of officer immunity has been dominated by the presumed impact of liability upon the performance by public officials of their discretionary functions, the case for immunity is strengthened by other considerations which apply to discretionary and nondiscretionary action alike. Holding public officials personally liable for all the consequences of their actions may be unfair. In the first place, the law often affirmatively requires officials, unlike private citizens, to take action associated with a strong likelihood of injury to others.[29] Certain high-risk services—fire and police protection, for example—have virtually no private law counterpart. Second, some governmental action is peculiarly inclined to affect the lives and fortunes of thousands of people. Concepts such as proximate cause, which enable courts to adjust the scope of liability in tort cases, may fail to protect officials from crushing financial burdens in cases involving many claimants. That these added objections to personal liability would seem to apply to nondiscretionary as well as discretionary action has not prevented most courts from confining officer immunity to acts of the latter kind. Thus, it seems that the courts are troubled chiefly by the danger of bridling the free exercise of judgment by public officials.[30]

---

24. *See generally* W. PROSSER, *supra* note 14, at 988-89.

25. *See generally* David, *supra* note 3, at 152, 283-84; Jaffe, *supra* note 3, at 218.

26. *See* Barr v. Matteo, 360 U.S. 564, 574-75 (1959); Berberian v. Gibney, 514 F.2d 790 (1st Cir. 1975); Norton v. McShane, 332 F.2d 855 (5th Cir.), *cert. denied*, 380 U.S. 981 (1965); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir.), *cert. denied*, 305 U.S. 643 (1938). A similar immunity exists in California. *See* White v. Towers, 37 Cal. 2d 727, 235 P.2d 209, *cert. denied*, 305 U.S. 643 (1951).

27. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 456 F.2d 1339, 1346 (2d Cir. 1972) (holding police officers personally liable in damages for fourth amendment violations committed in the course of conducting an arrest or search, unless they can show that they acted "in good faith and with a reasonable belief in the validity" of their action). For cases predicating constitutional torts on the violation of other constitutional guarantees, see Brault v. Town of Milton, 527 F.2d 730 (2d Cir. 1975) (fourteenth amendment); Mark v. Groff, 521 F.2d 1376 (9th Cir. 1975) (fifth, sixth, and eighth amendments); Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974) (fourth and fifth amendments).

28. Frequently, both common law and constitutional tort claims are raised in the same case. *See, e.g.*, Williams v. Gorton, 529 F.2d 668, 670-71 (9th Cir. 1976); Paton v. La Prade, 524 F.2d 862, 866-67 (3d Cir. 1975); Roberts v. Williams, 456 F.2d 819, 821 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971).

29. *See* Van Alstyne, *Public Policy*, *supra* note 1, at 468-69; CALIFORNIA LAW REVISION COMM'N, RECOMMENDATION RELATING TO SOVEREIGN IMMUNITY 810 (1963).

30. Courts are particularly disturbed by the fact that officials who are invited to exercise discretion may later be held liable because a judge or jury disagrees with their action. *See* Scheuer v. Rhodes, 416 U.S. 232, 240 (1974); Smith v. Cooper, 256 Or. 485, 505-11, 475 P.2d 78, 88-90 (1970). *See generally* Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889, 912-14 (1965).

The dramatic rise in recent years in the number and scale of civil damage actions against government officials has heightened concern over the implications of officer liability.[31] Nevertheless, the courts continue to disagree on how best to resolve the tension between society's interest in compensating its injured and in keeping public officials unafraid. Thus they remain divided over the kind of immunity that public officials should enjoy. This division is especially apparent on the federal level. Influenced by scholarly criticism, as well as by the acceptance of qualified immunity in state law[32] and in federal civil rights[33] and constitutional tort[34] actions, the United States Court of Appeals for the Second Circuit recently held in *Economou v. United States Department of Agriculture*[35] that federal administrative officials are no longer entitled to absolute immunity from liability. The court found that immunizing officials only when they act in good faith and with a reasonable belief in the lawfulness of their action offers them adequate protection, and that the added security that absolute immunity would provide does not justify denying relief to the victims of bad faith or unreasonable conduct.[36] Shortly thereafter, a panel of the United States Court of Appeals for the District of Columbia Circuit adopted a similar position,[37] but that court, upon rehearing the case en banc, subsequently decided to reaffirm the rule of absolute immunity.[38] Since the *Economou* decision itself will be reviewed by the Supreme Court during its current Term,[39] clarification of federal law in this regard may soon be expected.

---

31. *See* Norton v. Turner, 427 F. Supp. 138, 151 n.18 (E.D. Va. 1977); *Hearings on Supplemental Appropriations Bill of 1977 Before Subcomms. of the House Comm. on Appropriations*, 95th Cong., 1st Sess. 546, 559-60 (1977) [hereinafter cited as *House Supplemental Appropriations Hearings*]; Marro, *When Officials are Sued, Who Should Defend Them?*, N.Y. Times, Mar. 27, 1977, § 4 (News of the Week in Review) at 5, col. 4.

32. *See, e.g.*, Paoli v. Mason, 325 Ill. App. 197, 59 N.E.2d 499 (1945); State *ex rel.* Robertson v. Farmers' State Bank, 162 Tenn. 499, 39 S.W.2d 281 (1931).

33. *See, e.g.*, Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967). These cases were brought under 42 U.S.C. § 1983 (1970), according to which any person acting "under color of" state law is liable in damages for depriving any other person of his constitutional or civil rights. They make the immunity of each public official from liability under § 1983 depend upon a balance between impairment of his performance as a result of his exposure to liability, on the one hand, and the remedial purposes of the statute, on the other. The incongruity between the absolute immunity under Barr v. Matteo, 360 U.S. 564 (1959), and the qualified immunity applicable to § 1983 actions has been noted by the courts. *See, e.g.*, Expeditions Unltd. Aquatic Enterprises, Inc. v. Smithsonian Inst., 566 F.2d 289, 299 (D.C. Cir. 1977) (en banc) (Robinson, J., concurring). *See generally Developments, supra* note 3, at 1155-56.

34. *See* note 27 *supra*.

35. 535 F.2d 688 (2d Cir. 1976), *cert. granted sub nom.* Butz v. Economou, 429 U.S. 1089 (1977) (No. 76-709).

36. *Id.* at 696.

37. Expeditions Unltd. Aquatic Enterprises, Inc. v. Smithsonian Inst., No. 74-1899 (D.C. Cir. June 28, 1976).

38. Expeditions Unltd. Aquatic Enterprises, Inc. v. Smithsonian Inst., 566 F.2d 289 (D.C. Cir. 1977) (en banc).

39. Butz v. Economou, 429 U.S. 1089 (1977), *granting cert. to* 553 F.2d 688 (2d Cir. 1976). This may also provide an occasion for the Supreme Court to address itself to the problem of the incongruity between the immunity standards applicable to the same official in common law and constitutional tort cases. *See* note 27 and accompanying text *supra*.

II. The Need for an Integrated System of Governmental Tort Law

Because the doctrines of sovereign and officer immunity spring from distinct, if related, concerns, each has evolved independently. This continuing dissociation is not limited to jurisdictions that still lack general legislation on governmental tort liability.[40] Even when legislatures undertake to restructure governmental tort law from the bottom up, they tend to leave officer liability curiously out of the picture in important respects.

A. *The Coexistence of Governmental and Officer Liability*

In the first place, few statutory waivers of sovereign immunity address the threshold question of whether the introduction of governmental liability has the effect of immunizing the individual official.[41] Many state statutes say nothing on the subject,[42] though if litigation under the Federal Tort Claims Act is any guide, the courts will probably interpret them as leaving public officials exposed to personal liability.[43] Most statutes that deal with officer liability do so only obliquely by authorizing or requiring the government to purchase liability insurance on behalf of its officers and employees,[44] to

---

40. For an outline of the states' varying statutory responses to this issue, see K. Davis, Seventies, *supra* note 1, at 554-56.

41. *See, e.g.*, Cal. Gov't Code § 820 (West 1966) (official still liable); Conn. Gen. Stat. § 4-165 (West Supp. 1978) (no suits against officials except for "wanton or willful" misconduct); Fla. Stat. Ann. § 768.28(9) (West Supp. 1976) (officials liable only if they acted "in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property"); N.J. Stat. Ann. §§ 59:3-1, -14 (West Supp. 1977) (common law officer liability continues; nothing in statute meant to exonerate official for criminal activity, "actual fraud, actual malice or willful misconduct"); Tenn. Code Ann. § 23-3322 (Supp. 1977) (officials generally not subject to suit for damages for which governmental entity is liable); Tex. Civ. Code tit. 6252-19, § 15 (Vernon 1970) (common law immunity continues).

42. *See, e.g.*, Alaska Stat. § 09.50.250 (1977); Haw. Rev. Stat. § 662-2 (Supp. 1975); Ill. Ann. Stat. ch. 37, § 439.8 (Smith-Hurd Supp. 1978); Mich. Comp. Laws Ann. § 600.6419 (1968); Okla. Stat. Ann. tit. 11, § 1753 (West Supp. 1977).

43. *See* D. Schwartz & S. Jacoby, Litigation With the Federal Government § 14.106 at 233 (1970) [hereinafter cited as Federal Litigation]. The provision of the Federal Tort Claims Act to the effect that "judgment in an action under [the Act] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim," 28 U.S.C. § 2676 (1970), strongly suggests that, until judgment, suit may be brought against the officer.

Where independent federal jurisdiction exists, plaintiff may join the official as party defendant to a suit brought in federal district court against the United States under the Federal Tort Claims Act. *See* Benbow v. Wolf, 217 F.2d 203 (9th Cir. 1954). *Cf.* Morris v. United States, 521 F.2d 872, (9th Cir. 1975); Williams v. United States, 405 F.2d 951, 953-54 (9th Cir. 1969) (supporting joinder rule but finding no independent federal jurisdiction existed). *See generally* W. Prosser, *supra* note 14, § 47, at 295-96. One complication of joinder on the federal level is that a jury trial may be necessary with respect to the claim against the official, but not with respect to the claim against the government. *See* 28 U.S.C. § 2402 (1970). This may lead on occasion to inconsistent verdicts. *See* D. Schwartz & S. Jacoby, Government Litigation 503 (1963) [hereinafter cited as Government Litigation].

The fact that a litigant has sued the official and obtained a judgment against him is not a bar to suing the government on a similar claim in a later action, though satisfaction of either judgment operates to satisfy the other. *See* Moon v. Price, 213 F.2d 794 (5th Cir. 1954); United States v. First Sec. Bank, 208 F.2d 424, 428 (10th Cir. 1953).

44. For provisions authorizing the purchase of such insurance, see Ind. Code Ann. § 34-4-16.5-18 (Burns Supp. 1977); Iowa Code Ann. § 613A.7 (West Supp. 1977);

provide individual defendants with a free defense in damage suits arising out of their official action,[45] or to pay judgments rendered against them.[46]

Assuming that the advent of governmental liability does not bar litigants from suing public officials in their individual capacity, a number of important procedural questions arise. If a prospective plaintiff must give the government formal notice of his tort claim before bringing suit against it, must he also notify the government when he intends to sue one of its officers or employees instead?[47] Do special courts or commissions that have been established to decide governmental tort claims have jurisdiction over actions against individual officials arising out of the same set of facts, and if so, is that jurisdiction concurrent or exclusive?[48] Few statutes answer such questions.

B. *The Coextensiveness of Governmental and Officer Tort Liability*

The more difficult problem is whether the liability of public officials should be coextensive as well as coexistent with governmental liability. The solution depends not only upon whether the action is regarded as tortious irrespective of whom the plaintiff chooses to sue, but also upon how the term "scope of authority" is defined and whether the term "discretionary" is given the same meaning for purposes of both governmental and officer immunity. Unfortunately, few tort claims statutes take any position on these points.[49]

NEV. REV. STAT. § 41.038 (1977); N.Y. GEN. MUN. LAW § 52 (McKinney 1977); OKLA. STAT. ANN. tit. 11, § 1757 (West 1976); TEX. CIV. CODE ANN. tit. 6252-19, § 9 (Vernon 1970). For provisions requiring the purchase of such insurance, see IDAHO CODE § 6-919 (Supp. 1977); ILL. ANN. STAT. ch. 127, § 35.9(h) (Smith-Hurd Supp. 1978); VT. STAT. ANN. tit. 29, § 1401 (1970).

45. For examples of legislation authorizing the government to defend its officers, see FLA. STAT. ANN. § 111.07 (West 1975) (except for action taken "in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property"); MICH. COMP. LAWS ANN. § 691.1408 (1968); MINN. STAT. ANN. § 466.07(1), (2) (West 1977) (except for "malfeasance in office or willful or wanton neglect of duty"); N.Y. PUB. OFF. LAW § 17(2) (McKinney Supp. 1977); N.C. GEN. STAT. §§ 143-300.3, 300.4(a)(2) (1974) (except for "actual fraud, corruption or actual malice"). For examples of statutes requiring the government to do so, see IDAHO CODE § 6-903(b), (c) (Supp. 1977) (except for conduct showing "malice or criminal intent"); IOWA CODE ANN. §§ 25A.21, 613A.8 (West Supp. 1977); OR. REV. STAT. §§ 30.285(3), 30.287(1) (1975) (except for "malfeasance in office or willful or wanton neglect of duty"); VT. STAT. ANN. tit. 3, § 1101(a) (Supp. 1977); WASH. REV. CODE ANN. § 4.92.070 (Supp. 1976) (only for "good faith" conduct).

46. For examples of legislation authorizing the government to pay judgments against its officers, see ILL. ANN STAT. ch. 85, § 2-302 (Smith-Hurd 1966); IND. CODE ANN. § 34-4-16.5-5(b) (Burns Supp. 1977); MICH. COMP. LAWS. ANN. § 691.1408 (1968). For provisions requiring the government to do so, see note 97 *infra*.

47. *See, e.g.*, Schiavone v. Nassau County, 41 N.Y. 2d 844, 362 N.E.2d 252, 393 N.Y.S.2d 701 (1977); Fitzgerald v. Sanitation Dist. No. 6, 89 Misc. 2d 1078, 393 N.Y.S.2d 542 (City. Ct. 1977). *See generally* CALIFORNIA LAW REVISION COMM'N, *supra* note 29, at 1016-17. A few statutes provide a specific answer to the question. *See, e.g.*, MINN. STAT. ANN. § 3.736(5) (West 1977).

48. For recent examples of litigation over this question, see Abbott v. Secretary of State, 67 Mich. App. 344, 240 N.W.2d 800 (1976); DeVivo v. Grosjean, 48 App. Div.2d 158, 368 N.Y.S.2d 315 (1975).

49. *See, e.g.*, ALASKA STAT. § 09.50.250 (1976). Under statutes which immunize the government from liability whenever the official involved is immune, the term "discretionary,"

The matter is further complicated by the fact that nearly every general waiver of governmental immunity contains, in addition to a broad discretionary acts exemption, a list of specific tort claims that remain barred.[50] With a few exceptions, state tort claims statutes do not indicate what bearing such exemptions have upon the common law immunity of public officials.[51] In the absence of legislative guidance, the courts have gone in different directions on this basic issue. Some, insisting on a strict separation between governmental and officer liability, deny individual officials any benefit of the government's statutory immunities.[52] This might lead to the curious result of holding an official personally liable for the good faith execution of a statute, even though the jurisdiction's tort claims statute immunizes the government against precisely such a claim.[53] Other courts have gone to the opposite extreme by assuming an almost axiomatic correlation between the exemptions from governmental and officer liability. In a few instances, this assumption may be justified by statutory language suggesting that the government should enjoy immunity whenever its officials enjoy it,[54] or vice versa.[55] But some courts have adopted this view without the benefit of statutory guidance,[56] and usually without addressing the policy issues involved.

Even in the absence of any statutory framework, a few courts have made serious attempts to coordinate governmental and officer liability. The

---

by definition, has the same meaning in both contexts. *See, e.g.*, CAL. GOV'T CODE § 815.2(b) (West 1966). For a recent judicial suggestion that the term might be defined differently depending upon whether governmental or officer immunity is at stake, see Smith v. Cooper, 256 Or. 485, 497, 501, 475 P.2d. 78, 84, 86 (1970).

50. Among the more common examples are exclusions of liability in connection with the inspection of real property, *see, e.g.*, N.J. STAT. ANN. § 59:3-7 (West Supp. 1977), the issuance of licenses, *see, e.g., id.* § 59:3-6, and the enforcement of an unconstitutional statute or regulation, *see, e.g., id.* § 59:3-4.

51. *See, e.g.*, ALASKA STAT. § 09.50.250 (1976); HAW. REV. STAT. §§ 662-14, -15 (Supp. 1975). *But see* IND. CODE ANN. § 34-4-16.5-3 (Burns Supp. 1977) (setting forth a list of exclusions common to both governmental and officer liability). *See also* MINN. STAT. ANN. § 3.736(3) (West 1977); N.J. STAT. ANN. §§ 59:2-3, 3-2 (West Supp. 1977); OR. REV. STAT. § 30.265(3) (1975).

52. *See* Boyer v. Chaloux, 288 F. Supp. 366, 370 (N.D.N.Y. 1968); Tocco v. Piersante, 69 Mich. App. 616, 621, 245 N.W.2d 356, 359 (1976); Rhynders v. Greene, 255 App. Div. 401, 402, 8 N.Y.S.2d 143, 144 (1938); Fiebinger v. City of New York, 182 Misc. 1007, 1010-11, 51 N.Y.S.2d 383, 385 (Sup. Ct. 1944). On the other hand, the courts have also held that legislative abrogation of governmental immunity does not necessarily imply abrogation of officer immunity as well. *See* Smith v. Cooper, 256 Or. 485, 494-95, 475 P.2d 78, 83 (1970).

53. *See* Henke, *Oregon's Governmental Tort Liability Law from a National Perspective*, 48 ORE. L. REV. 95, 121 (1968) (citing OR. REV. STAT. § 30.265(d) (1975) and Gearin v. Marion County, 110 Or. 390, 396-97, 223 P. 929, 931-32 (1924)).

54. *See, e.g.*, Thiele v. Kennedy, 18 Ill. App. 3d 465, 467, 309 N.E.2d 394, 395-96 (1974) (citing ILL. REV. STAT. ch. 85, § 2-109 (Smith-Hurd 1966)); Blanchard v. Town of Kearny, 145 N.J. Super. 246, 249, 367 A.2d 464, 465-66 (Law Div. 1976) (citing N.J. STAT. ANN. § 59:2-2(b) (West Supp. 1977)).

55. This would seem to be the import of tort claims statutes giving equal treatment to damage actions whether brought against the state or against its officers. *See, e.g.*, IOWA CODE ANN. § 25A.2(5) (West Supp. 1977).

56. *See, e.g.*, Creelman v. Svenning, 67 Wash.2d 882, 885, 410 P.2d 606, 608 (1966). *See generally* Jaffe, *supra* note 3, at 213. Some courts have suggested that if the government is exposed to liability, its officers should be exposed to liability as well. *See, e.g.*, Foyster v. Tutuska, 44 Misc.2d 303, 304-05, 253 N.Y.S.2d 634, 636-37 (Erie County Ct. 1964), *rev'd on other grounds*, 25 App. Div. 2d 940, 270 N.Y.S.2d 535 (1966).

decision of the District of Columbia Circuit in *Carter v. Carlson*[57] illustrates the magnitude of the task. In that case, plaintiff, alleging that he had been arrested by a District of Columbia police officer without probable cause and then beaten with brass knuckles, sued the officer, who was never found for service of process, his precinct captain, the Chief of Police, and the District of Columbia. In reversing the district court's summary dismissal, Judge Bazelon observed for the majority that common law immunity for discretionary acts does not extend to torts committed by police officers in the course of making an arrest.[58] However, since the arresting officer was not a party, the court turned immediately to the possible liability of the captain and Chief of Police. In keeping with the common law rule, it held that they would be entitled to immunity only if their supervision and training of the officer amounted to discretionary action, a matter to be decided by the district court.[59]

The court then examined the liability of the sovereign, the District of Columbia. It observed that while the District's direct liability for inadequately training or supervising police officers likewise depended upon the discretionary nature of those responsibilities,[60] the District might also be vicariously liable for the torts of its officials. On this point, the court took the categorical view that if an arresting officer is not immune from liability for the torts he commits in making an arrest, then the government employing him should not be immune from liability for them either: "If the arresting officer himself is subject to suit for his tort, it is hard to conceive of any substantial additional threat to the efficiency of government that would result from subjecting the District to suit as well."[61]

Finally, the court considered the government's potential vicarious liability for the conduct of the captain and Chief of Police. It held first that, as in the case of the arresting officer, if the captain or Chief of Police were liable, the District of Columbia should automatically be liable as well. In its view, if the threat of personal liability did not impair the officers' performance of duty, the threat of governmental liability could not do so.[62] But the court went still further, suggesting that the lower court might still hold the District of Columbia vicariously liable for the actions of the captain

57. 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973).

58. *Id.* at 362-63.

59. *Id.* at 364. The court noted that even if the captain or chief were protected from liability at common law, they might both be subject to suit under 42 U.S.C. § 1983 (1970) for deprivation of plaintiff's constitutional rights, since that statute does not imply a broad common law immunity for all government officers exercising discretionary functions. *Id.* at 365. The Supreme Court reversed the court of appeals on this point, holding that the District of Columbia is not a "State or Territory" within the meaning of § 1983. District of Columbia v. Carter, 409 U.S. 418 (1973).

60. 447 F.2d at 358.

61. *Id.* at 366.

62. *Id.* at 367.

and Chief even if they were found to enjoy personal immunity. This depended upon a policy judgment to be made by the lower court:

> With respect to some government functions, the threat of individual liability would have a devastating effect, while the threat of government liability would not significantly impair performance. If the trial court determines that this is such a case, then the officers, but not the District, will be entitled to immunity at common law.[63]

A second notable effort at integrating governmental and officer liability was made by the California Supreme Court in *Lipman v. Brisbane Elementary School District*.[64] In that case, a superintendent of schools brought a damage action against the school district and three of its trustees alleging in part that the trustees had made defamatory statements concerning her official conduct to the press, to members of the public, and to government officials engaged in investigating charges of misconduct against her. The court ruled that the trustees' cooperation in the investigation was a discretionary activity entitling them to absolute immunity from suit.[65] Nevertheless, it held that they might still be liable with respect to statements made to the press and public, since making those statements lay beyond the scope of their authority.[66] On the other hand, precisely for that reason, the school district could not be made to answer for them.[67]

Significantly, as in *Carter*, the court advanced the converse proposition that the government might be liable for injury caused by its officials even when the latter are personally immune. It considered it "unlikely that officials would be as adversely affected in the performance of their duties by the fear of liability on the part of their employing agency as by the fear of personal liability."[68] However, the court ultimately decided to extend immunity to the school district. While it did not explain this decision, the court presumably feared that exposing the district to liability would have too adverse an effect on the trustees.[69]

Although the *Carter* and *Lipman* opinions squarely confront the problem of the coextensiveness of governmental and officer liability, they do not offer entirely satisfactory solutions. On the first issue—whether the

63. *Id.* Recognizing the "conceptual difficulty with the notion of imposing vicarious liability on the District for the conduct of officers who are not themselves subject to liability," Judge Bazelon noted that under principles of respondeat superior, a master may assert his servant's substantive defenses, but not his immunity to suit. *Id.* at 367 n.26.

64. 55 Cal.2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961). The decision was rendered on the same day that the court discarded the state's common law rule of sovereign immunity. *See* Muskopf v. Corning Hosp. Dist., 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

65. *Id.* at 230, 233, 359 P.2d at 467, 469-70, 11 Cal. Rptr. at 99, 101-02.

66. *Id.* at 234, 359 P.2d at 470, 11 Cal. Rptr. at 102.

67. *Id.* at 230, 359 P.2d at 468, 11 Cal. Rptr. at 100.

68. *Id.* at 229-30, 359 P.2d at 467, 11 Cal. Rptr. at 99.

69. "There is a vital public interest in securing free and independent judgment of school trustees in dealing with personnel problems, and trustees, being responsible for the fiscal well-being of their districts, would be especially sensitive to the financial consequences of suits for damages against the districts." *Id.*

existence of officer liability necessarily implies governmental liability—the California court, but not the District of Columbia Circuit, expressly excepted the situation in which a public official acts beyond the scope of his authority.[70] While the meaning of the term "scope of authority" for these purposes is less than clear, some such exclusion is useful in relieving the government of liability where its connection to the tort is too remote.[71] Moreover, the District of Columbia Circuit assumed without discussion that the government should not be relieved of liability simply because the official acted willfully or wantonly within the scope of his authority.[72] The *Lipman* Court did not entertain the question. Although we may ultimately conclude that the government should be liable even in such situations,[73] the matter deserves more careful consideration. Finally, there may be independent reasons in a given case for limiting or excluding governmental liability that have little if anything to do with the danger of inhibiting public officials. Such reasons include fiscal considerations and the inappropriateness of judicial involvement in political decisionmaking.[74] Any automatic inference of governmental liability from officer liability may obscure such factors.

The converse position adopted by both the *Carter* and *Lipman* courts —that under certain circumstances the government should be liable for the torts committed by its officers though the officers themselves are not liable— rests on firmer ground.[75] Even if we may assume that the prospect of gov-

70. Because the defendants in *Carter* did not allege that the arresting officer had acted beyond the scope of his authority, the issue was not reached. *See* 447 F.2d at 361.

71. *See, e.g.*, Barr v. Matteo, 360 U.S. 564, 573-74 (1959). Whether the *Lipman* court decided the "scope of authority" issue properly is of course another matter. For example, it apparently gave no consideration to the question of whether the trustees knew or reasonably should have known that making statements about the superintendent to the press and public exceeded the scope of their authority. However great the need for compensation in any given case, it may be unfair to impose exclusive liability on the individual officer for honest and excusable misjudgments of this kind.

72. According to Judge Bazelon, "When a tort is made possible only through the abuse of power granted by the government, then the government should be held accountable for the abuse, whether it is negligent or intentional in character." 447 F.2d at 366.

73. The view that a master may be held vicariously liable for the intentional torts of his servants has gained broad acceptance. *See* 2 F. HARPER & F. JAMES, *supra* note 5, at §§ 26.9, 29.13; W. PROSSER, *supra* note 14, § 70, at 464-66; RESTATEMENT (SECOND) OF AGENCY §§ 245-49 (1958).

74. *See* 2 F. HARPER & F. JAMES, *supra* note 5, § 29.15, at 1661-65.

75. In recent years, a number of other courts have adopted this view. *See, e.g.*, Downs v. United States, 522 F.2d 990, 998 (6th Cir. 1975); Bridges v. Alaska Hous. Auth., 375 P.2d 696 (Alas. 1962); Krause v. State, 28 Ohio App. 2d 1, 8, 274 N.E.2d 321, 326 (1971), *rev'd on other grounds*, 31 Ohio St. 2d 132, 285 N.E.2d 736, *appeal dismissed*, 409 U.S. 1052 (1972). *Cf.* Smith v. Cooper, 256 Or. 485, 493-95, 475 P.2d 78, 82-83 (1970) (by implication). However, shortly after the *Lipman* decision, the California Law Revision Commission urged the legislature to immunize the government explicitly from liability whenever its officers and employees are immune. Such a provision was included in the state's new tort claims legislation. CAL. GOV'T CODE § 815.2(b) (West 1966). For similar provisions, see ILL. REV. STAT. ch. 85, § 2-109 (Smith-Hurd 1966); N.J. STAT. ANN. § 59:2-2(b) (West Supp. 1977).

In a recent decision holding that the government would be liable for the constitutional torts of law enforcement officers, even though the latter might be immune, the court relied heavily on legislative history of the 1974 Amendments to the Federal Tort Claims Act,

ernmental liability in damages will trouble any official who is sensitive to the disfavor of his superiors, it should not dampen his zeal nearly as much as the prospect of personal liability. Unless the government's exposure to liability can genuinely be expected to impair seriously the official's performance of duty, the government should not enjoy immunity from liability simply because the official is immune.

More important, as a policy matter, any rigid equation of governmental with officer immunity assumes a happy congruence between the compensatory purposes of tort law, on the one hand, and its deterrent and retributive purposes, on the other, that simply does not exist. Situations frequently arise in which it is appropriate to require the government to compensate for harm done by a public official, even though it is inappropriate to hold the official personally liable. For example, in the well-known case of *Miller v. Horton*,[76] a state health officer, acting under a statute requiring him to destroy horses infected with glanders, ordered plaintiff's horse put to death in the reasonable though mistaken belief that it had the disease. Imposing liability on the government rather than the innocent officer in that case would have provided the victims a remedy, while distributing the loss over the entire community in whose interest the program was presumably initiated. This would have been a fair and sensible result. Moreover, even if an official has acted culpably, placing the full monetary burden on his shoulders may be out of proportion to his fault. Consider the case of a municipal power plant operator whose slight delay in responding to danger signals paves the way for a blackout with untold financial consequences for the entire community.

A further justification for accepting a broader scope of governmental than officer liability is that some losses occasioned by governmental activity may not be traceable to any particular official. For example, legislation may impose duties upon the government that the latter simply fails to implement. Some state tort statutes now deal explicitly with this situation by establishing governmental liability in damages for failure to exercise reasonable diligence to carry out the law.[77] More generally, however, a governmental operation may suffer from inefficiency, delay or other systemic disorders that cannot be laid at the feet of any particular official yet still cause injury that warrants compensation.

---

codified at 28 U.S.C. § 2680(h) (Supp. V 1975). Norton v. Turner, 427 F. Supp. 138, 146-50 (E.D. Va. 1977).

The view that governmental immunity should be narrower than officer immunity has found support in the literature. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.17 (Supp. 1970). *See also* 2 F. HARPER & F. JAMES, *supra* note 5, at § 29.15.

76. 152 Mass. 540, 26 N.E. 100 (1891) (Holmes, J.). For a decision immunizing the official, but not the public entity, in such a situation, see Bridges v. Alaska Hous. Auth., 375 P.2d 696 (Alas. 1962).

77. *E.g.*, CAL. GOV'T. CODE § 815.6 (West 1966).

C. *The Allocation of Liability*

Even assuming a perfect correlation between the tort liability of the government and its officials, the problem remains of allocating the burden between them in any given case. Indeed, this problem may arise as long as there is any overlap in liability. In situations in which both the government and the individual official are sued for torts committed by the official while acting within the scope of his authority, courts may have to resort to common law or statutory principles of responsibility among joint tortfeasors in deciding whether and to what extent apportionment of damages or contribution is appropriate.[78] Application of such general rules in the peculiar context of governmental torts may produce individual results that are undesirable for reasons discussed earlier.[79] Moreover, the official may have acted in whole or in part beyond the scope of his authority, and to that extent he should be exclusively liable. Matters become still more complex when the government is directly rather than vicariously liable, as in cases in which it breaches an independent duty to supervise its officers and employees or where the deficiency complained of is basically systemic in character.[80]

The fact that litigants frequently sue only the government, on the assumption that its pocket is invariably broader and deeper, does not dispose of these difficulties. If the litigant recovers, the common law may entitle the government to indemnification from the official in whole or in part.[81] Conversely, if a litigant chooses to make the individual official his sole defendant, and prevails on the merits, that official too may have a common law right of recovery against the government.[82] Until recently, tort claims legislation ignored this aspect of the allocation problem. The silence of the Federal Tort Claims Act, for example, left it for the courts to decide that the Act confers neither upon the negligent federal official [83] nor upon the United States[84] a right of indemnity against the other. Recent state

78. *See* F. HARPER & F. JAMES, *supra* note 5, §§ 10.1, 10.2, 20.3; W. PROSSER, *supra* note 14, § 50, at 305-07, § 52; FEDERAL LITIGATION, *supra* note 43, at 210.

79. *See* notes 29-30 and accompanying text, *supra.*

80. *See* 1 F. HARPER & F. JAMES, *supra* note 5, § 10.1, at 699 n.49; text accompanying note 77 *supra.*

81. The common law entitles one who is vicariously liable for the harm done by another person to complete indemnity from the latter. *See* 1 F. HARPER & F. JAMES, *supra* note 5, at 723; note 141 *infra.*

82. This will most often be the case where the employee acts at the specific direction of the employer and in justifiable reliance on the lawfulness of his action. *See* Sorge v. City of New York, 56 Misc.2d 414, 419, 288 N.Y.S.2d 787, 794-95 (Sup. Ct. 1968) (employee has right to complete indemnity if not *in pari delicto* with employer). 1 F. HARPER & F. JAMES, *supra* note 5, at 725. *But see* Fiebinger v. City of New York, 182 Misc. 1007, 1010-11, 51 N.Y.S.2d 383, 385 (Sup. Ct. 1944). Pursuit by a public official of a right of indemnification from the government may be precluded by the sovereign immunity doctrine where it is still in effect.

83. *See* Uptagrafft v. United States, 315 F.2d 200 (4th Cir.), *cert. denied,* 375 U.S. 818 (1963). However, a joint tortfeasor may sue the United States for contribution under the Act. United States v. Yellow Cab Co., 340 U.S. 543 (1951).

84. *See* United States v. Gilman, 347 U.S. 507 (1954). *See* notes 140-42 and accompanying text *infra.* Even under *Gilman,* however, the United States may implead an insurer

legislation is more explicit. Some statutes require the government, within stated limitations, to pay judgments rendered against its officials or to indemnify the latter for judgments they have already paid.[85] Others entitle an official who is sued to a free legal defense by government attorneys[86] or to reimbursement of his litigation costs.[87] On the other hand, state legislation frequently provides the government with a limited right of indemnity against its officials both for judgments it has had to pay as a result of their misconduct[88] and for the litigation costs involved.[89]

The ill-defined relationship between governmental and officer liability at common law and, to a lesser extent, under tort claims legislation, calls for remedial action. First, on a practical level, prospective plaintiffs need a clearer idea than they can possibly have today of the monetary responsibility of governments and their officials. The current proliferation of defendants in damage actions against public authorities may not be due entirely to nuisance value, but may owe something to litigants' honest uncertainty over what relief if any can be expected from whom. Second, confusion over the relationship between governmental and officer liability has serious implications for the courts, for it compels them to cope with the intricate problems of coordination discussed in this section on a cumbersome case by case basis. Third, such confusion leaves essentially unresolved that imponderable with which the law seems so concerned—the impact upon public officials of the threat of personal liability.[90] Admittedly, the difficulty of devising a formula that will maximize the putative benefits of fear, while minimizing its harm, can scarcely be exaggerated. But even in the absence of further empirical research, common sense admonishes against choosing a system in which the climate of fear is too unpredictable either to tame the reckless or to allow the timid to act.

Clearly, the task of balancing the interests relevant to governmental tort litigation is legislative in character. The following section explores some statutory alternatives to the pattern of vaguely parallel governmental and officer tort liability that prevails today.

---

as third party defendant in a pending tort action, provided the government is the insured under a policy covering injury caused by the official involved. GOVERNMENT LITIGATION, *supra* note 43, at 490.

85. *See* notes 96-97 *infra*.

86. *See* note 45 *supra*.

87. *See, e.g.*, CAL. GOV'T CODE § 996.4 (West 1966) (except in cases of "actual fraud, corruption or actual malice"); CONN. GEN. STAT. ANN. § 4-16a (West Supp. 1978) (except in cases of "wanton, reckless, or malicious" acts); UTAH CODE ANN. § 63-48-4 (Supp. 1977) (except in cases of "gross negligence, fraud, or malice").

88. *See, e.g.*, CAL. GOV'T CODE § 825.6 (West Supp. 1977) (in cases of "actual fraud, corruption or actual malice"); IDAHO CODE § 6-903(d) (Supp. 1977) (in cases showing "malice or criminal intent"); NEV. REV. STAT. § 41.0337(9) (1977) (in cases of "wanton or malicious" conduct); UTAH CODE ANN. § 63-48-5(2) (Supp. 1977) (in cases of "gross negligence, fraud, or malice").

89. *See, e.g.*, IDAHO CODE § 6-903(d) (Supp. 1977) (in cases of "malice or criminal intent"); ORE. GEN. STAT. §§ 30.285(5), .287(3) (1975) (in cases of "wilful or wanton neglect of duty").

90. *See* notes 22, 24-25 and accompanying text *supra*.

1977

AMENDMENT #3 TO H.R. 9219
OFFERED BY MR. SEIBERLING

(election of remedies as to
Presidential appointees and
former employees)

section 5
section 6

en bloc:

(1) On page 5, line 19, immediately after "employee.", insert the following new sentence:

"In no event shall a tort claim arising under the Constitution of the United States by an individual who is no longer an employee of the Government at the time the claim is presented to a Federal agency under this chapter and by an appointee of the President as defined in chapter 78 of title 5, United States Code, lie against both the employee in his individual capacity and against the United States under section 2675 and section 1346(b) of title 28, United States Code."

(2) On page 5, line 25, AND ON PAGE 6, LINE 15, after "employee", insert the following:

", other than an employee who is no longer an employee of the Government at the time a claim is presented to a Federal agency under this chapter and other than an appointee of the President as defined in chapter 78 of title 5, United States Code."

AMENDMENT #1 TO H.R. 9219
OFFERED BY MR. SEIBERLING

(disciplinary procedure)

On page 11, immediately after line 12, add the following new section:

SEC. 12. Title 5, United States Code, is amended by adding immediately after Chapter 77 a new chapter 78 containing a table of contents and new sections 7801, 7802, 7803, and 7804, 7805, 7806 and 7807 as follows:

"CHAPTER 78--EMPLOYEE DISCIPLINE

"Sec.

"7801. Definitions

Section 7801. Definitions

For the purposes of this chapter:

(a) "Person means any person with rights recognized under the Constitution of the United States;

(b) "Federal agency" means a Federal agency, as defined in section 2671 of title 28, United States Code, which employs or employed an "employee" defined in subsection (c) of this section;

(c) "Employee", unless otherwise described, means a present "employee of the Government" as defined in section 2671 of title 28, United States Code;

(d) "Appointee of the President" means an employee of the Government, other than a uniformed member of the Armed Forces or Coast Guard, a Public Health Service officer, or a Foreign Service officer, appointed by the President with the advice and consent of the Senate; and

(e) "Disciplinary action" means removal, suspension without pay, reduction in rank or pay, admonishment or reprimand, or transfer, for such cause as will promote the efficiency of the service.

Section 7802. Administrative Inquiries Generally

(a) A person who brings an action against the United States on a tort claim under section 2675 or section 1346(b) of title 28, United States Code, arising under the Constitution of the United States, may within 60 days thereafter request, as provided herein, an administrative inquiry of the conduct alleged or found to have given rise to the claim.

(b) A person who brings an action under section 1346(b) on a tort claim arising under the Constitution of the United States may, not earlier than 60 days nor more than 120 days thereafter, request, as provided herein, an administrative inquiry of the conduct alleged to have given rise to the claim.

(c) A federal agency which undertakes to conduct an administrative inquiry of the conduct of one of its employees, may it its discretion invite a person believed to have been adversely affected by the conduct to participate in the administrative inquiry to the extent provided by sections 7803(b) and (e).

(d) A person who has requested an administrative inquiry under subsection (b), or who has been invited to participate in an administative inquiry under subsection (c), may not subsequently request an administrative inquiry into the same conduct under subsections (a) or (b).

Section 7803. Conduct of Employees of the United States

(a) A request under section 7802(a) or (b) for an administrative inquiry with respect to the conduct of an employee of the United States shall be made to the head of the federal agency or his designee, by which the employee is employed. The request and shall be accompanied by a written statement, certified and subscribed as permitted by section 1746 of title 28, facts

are known to the person making the request regarding the [illegible] of the employee which is alleged to have violated such person's rights under the Constitution, and a request may be made with respect to the conduct of an employee whose identity is unknown if the request sets forth other information sufficient for the commencement of a hearing.

(b) The inquiry shall be conducted without unnecessary delay by the head of the agency or his designee. If after preliminary inquiry, the head of the agency or his designee finds that the matter is so unsubstantiated as not to warrant further inquiry, he may, upon notice to the person under this subsection, terminate such inquiry. A hearing shall be held with respect to the conduct of the employee if there is a genuine, material and substantial dispute of fact which can be resolved with sufficient accuracy only by the introduction of reliable evidence in a hearing and the decision of the agency in the matter is likely to depend on the resolution of such dispute. In his sole and unreviewable discretion, the head of the agency or his designee, may give to a person in the event of hearing the opportunity to examine and cross-examine witnesses, and to suggest witnesses to be called and documents to be produced. The head of the agency or his designee shall determine whether disciplinary action is warranted, issue a statement of findings and, if appropriate, state the nature and degree of disciplinary action taken, and notify the person of the action taken by the agency and the reasons therefor.

(c) Except as provided by subsection (e), within 60 days after notification of the action taken by the agency, or if no final agency action has been taken within one year after

inquiry was requested, the person may request an administrative review by the appropriate official designated by section 7805. The individual or body conducting the administrative review shall determine on the record whether the action taken by the agency was reasonable. If no final agency action has been taken, or if it is unable to conduct such review because it finds the record inadequate, it may remand to the agency for further proceedings or it may, in its discretion, supplement the record by taking additional evidence. The final decision shall be transmitted to the agency, the employee and the person requesting the review, and shall include a statement of findings and a recommendation, which except as provided by section 7807(d) shall be binding on the agency, with respect to disciplinary action against the employee.

(d) Except as provided by subsection (e), within 60 days after the issuance of a final decision on an administrative review, the person requesting the inquiry may petition for review of the final decision by a district court of the United States unless the conduct involved is that of a uniformed member of the Armed Forces as described in section 101(4) of title 10, United States Code, in which event he may petition for review by the United States Court of Military Appeals. The Court may deny the petition, affirm the decision, or set aside the decision and remand for further proceedings if it finds the decision to be arbitrary or capricious, or finds material factual determinations to be unsupported by substantial evidence, on the basis of its review of the decision, the reasons therefor, and the recommendation with respect to disciplinary action. The court's review shall [illegible] protected

from disclosure by statute, by executive order relating to the national security, national defense, or foreign affairs, or in the court's own discretion if it determines that in camera review is necessary.

(e) The right to request an administrative review under subsection (c) and to petition for judicial review under subsection (d) shall not be available to a person who has not obtained a monetary recovery from the United States on a claim under section 2675 or in a suit under section 1346(b) of title 28, United States Code, arising under the Constitution of the United States, unless the agency which conducted this inquiry under section 7803(b) permitted a person to participate and so consents in its sole and unreviewable discretion.

Section 7804. Conduct of former Employees and Presidential Appointees.

(a) A request under section 7802 for an administrative inquiry with respect to the conduct of a former employee of the United States or a present or former appointee of the President shall be made to the appropriate individual or body described in section 7805.

(b) The individual or body conducting an administrative inquiry under this section shall conduct such inquiry without unnecessary delay and may in its discretion hold a hearing. Such individual or body shall prepare a written report of the results of the inquiry which shall include a statement of findings. Such repo shall be served promptly on the person whose conduct is the subject of the inquiry and shall be made public not less than 35 days thereafter, unless public release is enjoined pursuant to subsection (prior to public release of the report, the former employee or present or former appointee of the President submits to the head of

agency or his designee a statement commenting on the report, such statement shall accompany the report when it is transmitted to any person and when it is made public.

(c) A person whose conduct is the subject of an administrative inquiry under this section may, within 30 days after service upon him of the report of the inquiry, petition a district court of the United States to review the report and enjoin its public release on the grounds that it is arbitrary or capricious.

Section 7805. Individuals and Bodies Conducting Inquiries and Review

An administrative inquiry under section 7804 or an administrative review under section 7803(c) shall be conducted by:

(a) The Secretary of Defense, or his designee, with respect to a uniformed member of the Armed Forces as described in section 101(4) of title 10, United States Code;

(b) The Secretary of the Department in which the United States Coast Guard is operating, or his designee, with respect to a member of the Coast Guard;

(c) The head of an agency with a personnel system under the Foreign Service Act of 1946, as amended (22 U.S.C. 801 et seq.), or his designee, with respect to an officer or employee of the Foreign service;

(d) The head of an agency with a personnel system under the Public Health Service Acts, as amended (42 U.S.C. 201 et seq.), or designee, with respect to an officer or employee of the Public Health Service;

(e) A body designated by the President within sixty days of enactment of this Act, other than the Central Intelligence Agency, the Federal Bureau of Investigation, the National Security Agency, the

 or the

National Security Council and its component parts, with respect to an offi[illegible] intelligence activities; or

(f) The Civil Service Commission, or its designee, in any other case.

(g) A designee of a Secretary agency head or entity described i this section, who conducts an administrative review shall not be responsible to or subject to the supervision or direction of any designee of the agency who conducted the administrative inquiry under review.

(h) No person who has been an employee of the Central Intelligence Agency, the Federal Bureau of Investigation, the National Security Agency, the national intelligence components of the Defense Department or the National Security Council or its component parts, during the preceeding two years may be appointed to serve on the body designated to conduct an administrative review under subsection (c).

Section 7806. Regulations.

(a) Within 90 days after enactment of this chapter, the individuals and bodies described in section 7805 shall issue such regulations as are necessary and appropriate for the implementation of sections 7802-7805.

(b) Regulations issued by the Civil Service Commission under this section shall be approved by the Attorney General.

(c) The head of each federal agency subject to the administrative review provisions of section 7803(c) shall comply

...n the regulations issued by the particular administrative body designated by section 7805 to review administrative inquiries conducted by the federal agency pursuant to the section 7803(b), and shall 60 days after the effective date of such regulations, issue rules, regulations and instructions not inconsistent therewith.

(d) For purposes of promulgating regulations pursuant to this section, the body designated under subsection (e) of section 7805 shall be an "agency" of the government within the meaning of 5 U.S.C. 551 (The Administrative Procedure Act).

(e) All regulations issued under this section shall be published for public comment and subject to judicial review under chapters 5 and 7 of this title.

Section 7807. Miscellaneous.

(a) Nothing in this chapter shall affect the rights of an employee to appeal or to seek review or other means of redress of any disciplinary action taken against him which he would have under other provisions of law. Provided, however, that an employee, who is the subject of a disciplinary action recommended by the Civil Service Commission pursuant to subsection 7803(c), shall not be required by any other provision of law to take an appeal to the Commission prior to seeking judicial review of that action.

(b) An employee who is not entitled under other provisions of law to seek administrative or judicial review of disciplinary action

taken against him may, if an administrative review is conducted under section 7803(c), participate in such review and give evidence or testimony if a hearing is held, and, to the extent provided by section 7803(d), may petition for judicial review of a final decision if any disciplinary action recommended under subsection 7803(c) is greater than that proposed by the employing federal agency.

(c) Nothing in this chapter shall affect the availability of defenses which an employee may raise in any administrative or judicial proceeding.

(d) Nothing in this chapter shall require a federal agency to delay taking disciplinary action against an employee, or empower the Civil Service Commission to reduce the severity of disciplinary action taken by an agency against an employee who would not have a right to seek the Civil Service Commission's review of such action under other provisions of law.

(e) Nothing in this chapter shall authorize a federal agency to delay or refrain from taking disciplinary action against an employee in the absence of a request filed under section 7802(a) or (b).

(f) On or before September 30 of each calendar year, the President shall submit to the Speaker of the House and the President of the Senate a report for the preceeding year separately listing for each Federal agency the number of administrative inquiries undertaken pursuant to this chapter, a brief description of the nature of the inquiries, any administrative or judicial review of and the ultimate disposition.

(g) Notwithstanding any provision of law to the contrary, any party in an action for judicial review of agency action under section 7803(d) shall be entitled to recover reasonable attorneys'

fees, fees and costs of experts, and other reasonable costs of litigation, including taxable costs, incurred during judicial review if the court affords such person the relief sought in substantial measure. Reasonable attorneys' fees and other costs of litigation awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished."

1978
Section-By-Section Analysis of S. 3314

Section 1

Section 1 amends section 1346(b) of title 28, United States Code, to include under the Federal Tort Claims Act claims based on tortious conduct arising under the Constitution. In Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), the Supreme Court ruled that a complaint alleging that the Fourth Amendment to the Constitution had been violated by federal agents acting under color of the authority gives rise to a federal cause of action for damages. Such a cause of action rests upon a "constitutional tort" because the claim is based directly on the Constitution rather than a statute. Although the Supreme Court has not had an opportunity to confront the issue of extending Bivens beyond the Fourth Amendment, the reasoning upon which Bivens was based suggests that the same principles apply to other constitutional infringements by federal officers. In addition, the overwhelming majority of lower courts considering the issue have ruled that the Bivens cause of action applies to tortious acts which violate any part of the Constitution. Five federal circuit courts have ruled that Bivens applies to all constitutional infringements. Those extending the Bivens remedy to tortious violations of the First and Fifth Amendments are discussed above. The Committee intends that section 1346(b) of title 28, as amended by Section 1 of this legislation, be interpreted as applying to all tortious constitutional infringements recognized by federal courts now or in the future. That is, expansions of the term "constitutional tort" to include evolving judicial interpretations should be read into section 1346(b).

Under Section 1, the United States is liable for constitutional torts committed by federal employees acting within the scope of their authority or with a reasonable good faith belief in the lawfulness of their conduct, or under color of their authority. The meaning of term "under color of authority" is explained in the discussion on Section 6 below. The language of Section 1 provides that in a cause of action based on a constitutional tort, liability will be determined in accordance with federal law. In non-constitutional common law negligence actions brought under the Federal Tort Claims Act, liability is determined in accordance with applicable state law. Federal law is applicable when the claim is based upon an alleged tortious violation of the federal constitution because of the clearly unique federal nature of the claim.

Section 2(a)

Section 2(a) amends section 2672 of title 28 in the same manner that Section 1 amends section 1346(b). The Section conforms the administrative claim jurisdiction to include claims for constitutional tort violations, just as Section 1 broadens the jurisdiction for a Federal Tort Claims Act lawsuit.

Section 2(b)

Section 2(b) additionally amends section 2672 by providing that, regardless of amount, all awards, compromises, or settlements made by an agency on tort claims arising under the Constitution be effected only with prior approval of the Attorney General. Certification by an agency that a claim arose under the Constitution is required in order to ascertain whether the person receiving the compensation will be entitled to initiate and participate in an administrative inquiry respect-

ing the offending conduct as provided by Section 13 of the Bill. In order to ensure that uniform standards are applied by an agency in determining whether conduct rises to the level of a tortious constitutional tort, the amendment to section 2672 requires the Attorney General or his designee to approve the proposed finding of constitutional injury prior to completion of the award, compromise, or settlement.

Section 3(a)

Section 3(a) amends section 2674 of title 28, which is the section of the Federal Tort Claims Act that provides the method of determining liability. The first paragraph of Section 2674 is amended to make clear that the provisions of the first paragraph apply only to Federal Tort Claims Act suits based upon negligence theories as distinguished from constitutional deprivation allegations.

The second paragraph of Section 2674 remains unchanged.

Section 3(b)

A new third paragraph of section 2674 is provided by Section 3(b) to establish that in any Federal Tort Claims Act suit based upon alleged tortious constitutional deprivations the amount of compensation to be awarded is the same amount [of compensation to be awarded is the same amount] as would be awarded under the tort law of the state where the incident occurred. The state law question of the amount of compensation will not, of course, be considered unless under federal law a constitutional tort is found to have been committed. The new third paragraph also contains two provisos. The first proviso establishes the minimum and maximum damages a court may award in the event no actual damages are assessed. The first such provision establishes that for claims based upon tortious acts or omissions arising under the Constitution of the United States, regardless of state law, compensation shall not be less than liquidated damages of $1,000 at the minimum, and in the case of continuing violations, such as

warrantless electronic surveillance or mail openings in violation of the Fourth Amendment lasting several days or weeks, not less than $100 per day for each violation, not to exceed $25,000. In addition, in either case the court must award a reasonable attorney's fee and other litigation costs reasonably incurred. These provisions are drawn from section 2520 of Title 18, United States Code, which establishes a civil cause of action for the interception of wire or oral communications. The provisions of section 2520 are implicitly incorporated into the Federal Tort Claims Act to the extent conduct actionable under section 2520 constitutes tortious conduct under the Constitution. In a later part of this Bill, Section 11 provides that section 2520 shall not apply to civil damage remedies against federal employees who are acting within the scope of their office or employment, or acting under color of such office or employment. The liquidated damages provision, however, has been broadened to cover all constitutional torts of a continuous nature in addition to the interception or disclosure of wire or oral communications. Thus, although a claimant would no longer have a remedy against the federal employee personally, where the employee acts within the scope of his authority or with a reasonable good faith belief in the lawfulness of his conduct, it is clear that such a claimant would lose nothing by the passage of this Bill with respect to constitutional torts because the same or broader remedy, except for punitive damages, would be available against the United States pursuant to the Federal Tort Claims Act.

Although in consitutional tort cases the liquidated damage figure will often be the measure of damages, it would be grossly unfair to plaintiffs for the Government to involke Rule 68 of the Federal Rules of Civil Procedure by making an offer of judgment of that minimum amount. To do so would deter plaintiffs from attempting to prove that a greater amount of damages has been sustained. Providing a liquidated damages figure is intended to benefit the plaintiff, not to enable the Government to deter plaintiffs from engaging in appropriate discovery.

The question of whether a constitutional tort is a continuing one is a question of fact. In cases where some doubt exists and where plaintiffs may be awarded an amount

greater than the minimum amount, plaintiffs should be awarded the higher figure.

The second proviso to the third paragraph of section 2674 provides that the United States shall not assert as a defense to a suit based on an alleged tort arising under the Constitution, the absolute or qualified immunity of the employee including his reasonable good faith belief in the lawfulness of his conduct. Because the good faith defense is not available to the United States, questions of the state of mind of the employee are not relevant to a determination of the Government's liability. Exception is made in cases involving members of Congress, judges or prosecutors, or those performing such functions, in which case the United States may assert whatever immunity defenses are recognized by law. In the case of prosecutors the exception is intended to permit the United States to assert immunity defenses only as to acts committed while prosecutorial functions are actually being performed.

The purpose of the amendment is to ensure that victims of constitutional torts in most cases will receive at least liquidated damages upon proof that such torts have been committed. The amendment is in response to the situation confronting litigants who seek financial redress under contemporary law from individual government employees for alleged constitutional injuries. In virtually all cases, employees are able to defeat recovery by demonstrating a reasonable good faith belief in the lawfulness of their conduct despite the existence of a constitutional tort. The amendment to section 2674 would guarantee recovery of at least liquidated damages upon a showing that a constitutional tort has been committed notwithstanding the good faith belief of the employees involved. Exception is made with respect to Members of Congress for whom immunity is prescribed by the Constitution and cannot be waived by statute, and for judges and prosecutors who by the nature of their professions inevitably,

yet unintentionally, transgress constitutional limitations when ruling on and prosecuting uncertain and ill-defined areas of the law. The scope of immunity for all three, and those performing like functions such as their assistants, would be determined by federal law.

In subjecting the United States to liability for constitutional torts and in substituting the United States as the sole party defendant in cases in which the federal employee is accused of tortious conduct while acting within the scope of his authority or with a reasonable good faith belief in the lawfulness of his conduct, the Committee does not intend to insulate the federal employee from discovery. The plaintiff is entitled to full discovery on the facts of the employee's conduct which led the plaintiff to sue the United States.

Under Rules 30, 31 and 34, and 45(d)(1) of the Federal Rules of Civil Procedure the plaintiff can, respectively, depose the employee, submit written questions to the employee, and require the employee to produce documents. The use of interrogatories, under Rule 33, and of requests for admissions, under Rule 36, are discovery tools that apply to parties but not witnesses in a civil action. If interrogatories and requests for admissions are submitted to the United States in litigation under this legislation, the Committee intends for the Government to supply all information to the plaintiff that can be gained through communication with the employee and by taking reasonable steps for securing the employee's cooperation. As the courts have recognized in the context of litigation involving the United States, the Government is under a duty to make a reasonable effort to obtain information from third parties, including present and former employees. Rangers Insurance Co. v. Culberson, 49 F.R.D. 181 (D. Ga. 1969).

If the United States fails to cooperate with the plaintiff in discovery, it is the Committee's intention that all sanctions shall be available against the Government in litigation under the Federal Tort Claims Act, as amended by this Bill, as are permitted under law, including the Federal Rules of Civil Procedure.

The elimination of the good faith defense in suits against the United States in which violations of the Constitution are alleged, under Section 3(b) of this Bill, removes the issue of whether the employee acted in reasonable good faith from the litigation between the plaintiff and the United States. The removal of that issue is not intended to limit in any way the plaintiff's right to full and complete discovery on the nature of the employee's conduct and the extent of the violation in the context of cases involving constitutional torts.

Section 4(a)

Section 4(a) of this Bill makes applicable to constitutional torts the same conditions precedent to the institution of suit against the United States as are applicable to negligence suits by including a specific reference to constitutional torts in § 2675(a). Section 2 of the Bill amended section 2672 to conform the administrative claim jurisdiction to include claims for constitutional violations. The disposition of such claims, as provided in section 2675, is the logical extension of the earlier amendment.

Section 4(b)

Section 4(b) amends Section 2675(a) of title 28, by adding a proviso to permit class actions, if appropriate, in claims based upon

constitutional violations. The proviso requires, however, that the administrative claim presented to the agency expressly state the representative nature of the claim, a specific description of the class, the common interests of the claimant and such class and the basis of claimant's belief that he can fairly and adequately protect the interests of the class as their representative. The inclusion of this proviso serves two purposes. First, it apprises the agency that injury has been sustained by a class of which the claimant claims to be a member and affords the agency an opportunity, administratively, to consider and pass upon such a claim. Second, by presenting a claim as a class claim, the Government will be precluded from moving to dismiss a subsequently instituted class action on the ground that the conditions precedent to suit had not been met administratively. Of course, any suit seeking class action certification from the court would be required to meet the requirements of the Federal Rules of Civil Procedure, particularly Rule 23, even though a class-type claim had been filed. In considering a claim, however, the agency does not certify that a class does or does not exist. The requirement that the claimant notify the agency that he represents a class is purely for the purpose of notifying the agency of the nature of a claim.

Section 5

Section 5 amends section 2678 of title 28, by excluding from its provisions attorneys' fees, fees and costs incurred in the litigation of a tort claim arising under the Constitution which are controlled by the provisions of Section 3(b) which amends section 2674 of title 28. Attorneys' fees provided by section 2674 shall be separate from any damage award;

whereas, attorneys' fees for non-constitutional torts provided by section 2678 shall be a portion of and be payable by the client out of the judgment rendered. Furthermore, this provision exempts constitutional torts from the contingent fee provision of Section 2678. Therefore, a plaintiff's attorney may be awarded a contingent fee in excess of the limits provided in this Section if the court affirmatively finds that such fee arrangement is reasonable. The amount of such attorneys fees is not to be subtracted from the amount of damages awarded to a plaintiff. Because the amount of damages to be awarded will often not exceed the minimum damage figure, contingent fee arrangements in such situations may be unreasonable.

Section 6

Section 6 of the Bill amends section 2679(b) of title 28 to provide immunity to some individual federal employees. In its existing form, section 2679(b) immunizes only federal employees who are operating automobiles. As amended, the Section would immunize most federal employees other than those no longer employed by the Government and those whose appointment by the President was subject to Senate confirmation, from civil damage actions. Thus, the Section is the logical culmination of the series of statutes which on a piecemeal basis afforded immunity to specific categories of federal employees. With regard to traditional negligence suits, the federal employee is immune from suit if the acts or omissions which gave rise to the lawsuit were performed within the scope of the office or employment of the employee.

The Bill further expands the immunity of federal employees by providing the applicability of the immunity to suits which are based upon alleged tortious constitutional deprivations or violations, where employees act within the scope of their authority or with a reasonable

good faith belief in the lawfulness of their conduct. Although the applicable immunity is somewhat narrower in such cases than in traditional negligence cases, this standard plus the language of new section 2679(b)(2) will give most employees immunity from suit. This latter section gives a plaintiff the option of suing either the United States or the employee on constitutional tort claims for job-related conduct undertaken by the employee outside the scope of his authority or without a reasonable good faith belief. Should the plaintiff elect to sue the United States, his remedy will be exclusive and the employee will be immune from suit. The converse is true if the employee is sued. The Committee adopts this "election of remedies" approach so that employees guilty of egregious misconduct will not be immunized from personal damage actions. It is essential that such employees be personally accountable for such misconduct.

The distinctions among the three terms, "scope of office or employment," "scope of authority," and "under color of authority," are essential elements of the Committee's intention with regard to the exclusivity provision of this Section.

The term "scope of office or employment" encompasses an employee's conduct that is unlawful or unconstitutional. Thus, the operator of a government motor vehicle involved in an accident while driving in excess of the posted speed limit en route to an official destination would be considered as acting within the scope of his employment notwithstanding his violation of the speed limit. See generally, Avery v. United States, 434 F. Supp. 937 (D. Conn. 1977). This example illustrates the common law negligence cases for which the Committee is willing to immunize employees acting within the scope of the office or employment. Abuse of office or intentional misconduct are rarely if ever at issue in these cases so little is served by making the employee personally liable for such suits. The United States is in a better position

financially than the employee to compensate the victim for actual damages caused by negligent acts. Section 13 of this Bill provides administrative procedures for disciplining the employee for misconduct. In this way the employee can be held accountable for committing common law torts while a more responsible defendant, the United States, is liable for the damages resulting from the misconduct. Therefore, the Committee adopts the use of the term "scope of office or employment" with regard to common law torts in Section 6 thereby immunizing federal employees who act within the scope of their employment from liability for common law torts.

In the context of torts arising under the Constitution and in contrast to common law torts, the term "scope of office or employment" is inappropriate. This Bill requires that courts apply the law of the jurisdiction where the tort occurred. In recent years most jurisdictions have adopted an expansive definition of scope of office or employment which encompasses the intentional torts of employees. Thus employees who exceed their authority may nevertheless be acting within the scope of their employment.

The Committee rejects the approach taken in an earlier draft of this Bill immunizing all employees acting within the scope of their office or employment from suits for alleged constitutional violations. Such an approach is opposed because in the Committee's view employees who knowingly violate the constitutional rights of fellow Americans and in other respects exceed their authority, thereby committing a constitutional tort, should not be freed from directly accountability for their misconduct in the courts and through personal liability.

The "scope of authority" standard is narrower than scope of employment. Recently, in Butz v. Economou, 46 U.S.L.W. 4952, 4955-6 (June 29, 1978), the Supreme Court reaffirmed the well-established rule that an officer exceeds his authority when he "strays beyond the plain limits of [his] statutory authority." In addition, according to the Court, an officer exceeds his authority where his actions are unconstitutional. Within these parameters the Committee adopts "scope of authority" as one prong of the test for immunizing federal employees from personal liability for alleged constitutional violations. When an employee acts within the clear limits of his statutory authority without transgressing constitutional boundaries, he should be free from the burden of defending himself against a tort claim for damages.

As for the second prong of the immunity test for constitutional torts, the Committee concludes that an employee who acts with a "reasonable good faith belief in the lawfulness of his conduct", even if he or she proves later to be incorrect in that belief, should also be freed from personal liability. More significantly, the courts recognize that employees may successfully defeat a tort action for misconduct on the job with the good faith defense. Thus the second prong of the immunity test merely protects those employees from personal liability who are eventually likely to prevail as defendants in such actions.

Section 1 of this Bill makes the United States liable for constitutional torts committed by employees acting within the scope of their office or employment or under color thereof. Under the new subsection (b)(1) of section 2679(b) of title 28, however, the United States is exclusively liable only for the constitutional torts of employees who act within the scope of their authority or with a reasonable good faith belief in the lawfulness of their conduct. Thus all conduct which exceeds the two prongs of the immunity test for constitutional violations but falls within the color of the employee's authority will subject either the United States or the employee to personal liability, as provided in subsection (b)(2) of section 2679(b) of title 28.

The term, "under color of authority", refers to conduct that an employee represents as being related to a job responsibility, regardless of whether in fact such a relationship exists. If the conduct is related to an employment responsibility and is undertaken to further an interest of the employing agency, the conduct would be both within the scope of employment and under color of authority. On the other hand, if the conduct represented as employment-related is not, but is instead undertaken for personal gain, the conduct can be characterized as being performed under color of authority but not within the scope of employment. For example, a law enforcement officer who, upon presentation of his credentials, seizes illegal gambling proceeds as evidence incident to a law-

ful arrest would be acting both within the scope of his employment and under color of his authority. The same officer, however, who seizes the proceeds upon presentation of his credentials in order to obtain funds to satisfy a personal debt would not be acting within the scope of employment but would be acting under color of authority. Thus, the term "color of authority" can apply to conduct which represents the abusive use of lawful power.

The Committee concludes that while the United States, as employer, armed the employee with the indicia and powers of office and should be civilly responsible for any abuse of that office, the employee should not be freed from personal liability for such misconduct. The Committee rejects a previous draft of this Bill that would have immunized federal employees from committing constitutional torts while acting under color of their authority. Immunizing flagrant abuses of power might suggest to some employees that Congress condones such conduct. Quite the reverse is true. To emphasize this point the Committee adopts a system that subjects employees to suit for constitutional violations while they are acting solely under color of their authority. Except where the injured party chooses to sue the United States, the employee should be personally liable for such misconduct. Because, however, most plaintiffs will choose to sue the United States, administrative mechanisms are always available for disciplining the employee, including the procedures set forth in Section 13 of this Bill.

Under Section 6, presidential appointees -- that is, those employees appointed by the President whose nominations are subject to Senate confirmation -- and former employees are not immunized from liability for

committing alleged constitutional torts. While the United States is liable for tortious unconstitutional acts committed by presidential appointees and former employees under Section 1 of this bill, that liability is not exclusive. The Committee rejects a previous draft of this bill that would have immunized such employees from suit. The disciplinary procedure established in Section 13 of the Bill, the new subsection 7804 of title 5, for presidential apppointees and former employees fails to assure adequate accountability for their misconduct. A report is not a substitute for holding the employee personally liable for his misconduct. The Supreme Court's recent holding in Butz v. Economou, supra, that high-level officials enjoy only partial immunity from suits alleging that they committed unconstitutional acts reinforces the Committee's rejection of complete immunity. In addition, personal liability for presidential appointees and former employees is the only substantial course open to the Committee for holding such employees accountable for their misconduct because of the constitutional and jurisdictional barriers to administrative disciplinary procedures.

In conformance with the approach taken in other contexts of this Bill, in which the exclusive liability of the Government for the torts of employees has been rejected, the Committee adopts an election of remedies procedure here. The party alleging constitutional injury may sue either the United States or the presidential appointee or former employee accused of misconduct.

In this Bill the Committee adopts the election of remedies mechanism as a way to recognize both the responsibility of the United States for the torts of its employees and the importance for hold-

ing some employees personally accountable and liable for their misconduct. This device best effectuates the basic purposes of the Bill: providing a meaningful remedy to victims of constitutional wrongs, protecting individual federal employees from money damage lawsuits, and eliminating the necessity of having the Department of Justice hire private counsel to represent individual federal employees.

Section 7

Section 7 amends section 2679(d) of title 28 to make the language more specific. The original subsection (d) was somewhat confusing and produced some problems even in routine automobile accident cases. The cause of that confusion was that the preexisting statutory language attempted to cover suits brought in both state and federal court. Without treating procedures for the suits filed in the two courts separately, it is extremely difficult to cover all contingencies with specificity.

The subsection is now subdivided into three paragraphs. Subsection (d)(1) would apply to suits originally brought in a federal district court. Subsection (d)(2) applies to suits which are originally brought in a state court. A suit brought in state court against the employee is removed to federal court upon certification by the Attorney General and is thereafter treated just as if it had been brought originally in federal court against the United States under the Federal Tort Claims Act. Both of these subsections provide that upon certification by the Attorney General the suit shall proceed against the United States just as if it had originally been brought against the United States, and the United States will have availabl all defenses to which it would have been entitled had the action originally been brought against the United States.

against the United States. If the plaintiff choses to proceed against the United States in any of these instances, he would still be required to timely file an administrative claim under section 2672.

The last sentence of subsection (d)(2) indicates that in suits filed initially against the employee in state court when the United States district court finds on a motion to remand that certification by the Attorney General immunizing the employee from a personal damage action has been made improperly, the case shall be remanded to the state court for further judicial proceedings. This language is derived from the Drivers Act, which suggests that the procedure for challenging a certification is a motion to remand the case to state court. It is not meant to suggest that the Attorney General's certification can be challenged only in cases removed from state court. In cases filed initially in federal court, the district court may rule on the validity of the Attorney General's certification if the plaintiff presents the issue in opposing the defendant employee's motion to dismiss or a motion for substitution of parties. Nothing in this bill is intended to alter the degree to which such certification may be reviewed under existing precedents.

Subsection (d)(3) establishes that is a Federal Tort Claims Act lawsuit is dismissed because a form of federal compensation is the exclusive remedy of the plaintiff, the plaintiff can utilize the date of the filing of his claim or lawsuit as the date upon which his claim for compensation benefits was filed. The effect of this provision is to protect such a plaintiff against the possibility that he would not be able to file a lawsuit because of compensation system coverage but that he would not be eligible to receive compensation because he waited too long to make a claim for such compensation benefits. This language is quite similar to

language utilized in some of the statutes which have served to make specific categories of government employees (medical and paramedical employees of the Veterans Administration, the Public Health Service, and the Department of Defense) immune from suit.

Section 8

Section 8 adds to Section 2679 of Title 28 a new subsection (f) to assure that in certain cases appropriate disciplinary action be investigated and undertaken even if an aggrieved party decides not to initiate a disciplinary inquiry as provided by Section 13 of the Bill. The Bill does not, of course, completely immunize the federal employee from the consequences of his tortious conduct. If his conduct constitutes a criminal offense he may, of course, be prosecuted. If his conduct is, for example, reckless, malicious, or in wanton disregard of the rights of others, but does not constitute criminal conduct, the employee remains subject to disciplinary action, including dismissal. Although not required by this Section, the Attorney General may recommend the appropriate disciplinary action to be taken.

Section 9(a)

Section 9(a) amends the preamble to section 2680 of title 28 to make clear that the exceptions to suit against the United States do not apply to tort claims arising under the Constitution. Furthermore, in common law cases the Attorney General may not use the certification procedure and then cite a section 2680 exemption.

Section 9(b)

Section 9(b) amends section 2680(h) to eliminate existing provisions which provide that suit under the Federal Tort Claims Act cannot be based upon assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process. Suits based upon

upon those theories would be allowable against the United States if the Bill is passed. Several years ago this section was amended to provide that such suits could be brought against the United States if the acts were performed by certain law enforcement officers. Now such suits against the United States clearly will be permissible.

Section 10

Section 10 is a technical "repealer" section. There are in existence a number of statutory provisions that provide immunity to selected categories of government employees. If this bill is passed the piecemeal statutes would no longer be required, and Section 10 repeals those provisions. The Bill would have the further advantage that the provisions of law would be encompassed within the Federal Tort Claims Act, rather than being scattered throughout the United States Code as is now the case.

Section 10 also changes the designation of certain other sections which will remain in existence. The provisions of the existing statutes which provide for departmental or agency discretion and authority to indemnify individual employees or to purchase insurance to protect them in situations where the Federal Tort Claims Act does not apply remain in effect. The only parts that are repealed are those that are redundant of the Federal Tort Claims Act if this Bill is passed.

Section 11

Section 11 provides that Section 2520, Title 18, United States Code, shall not apply to civil causes of action against officers or employees of the United States while acting within the scope of their offices or employment, or under the color of such office or employment.

It is necessary to provide expressly that the cause of action established by that Section does not apply to federal employees to the extent that Sections 1, 6, and 7 of this Bill are applicable to civil damage actions that may be brought under Section 2520.

Section 12

Section 12 makes the provisions of the Bill retroactive to all pending cases against government employees based on claims for which the United States would be subject to suit if the same actions were brought after enactment of the Bill. The retroactivity provision is intended to further those interests of the legislation that seek to provide a more certain source of monetary recovery, protect federal employees from vexatious litigation, and significantly reduce the need of the Department of Justice to retain private counsel. The Section preserves the right of the plaintiff to a jury trial or to request punitive damages as to all suits in which the right to seek a trial by jury has not expired, for all claims pending on the date of enactment, and for all causes of action known to the aggrieved party on or before the date of enactment. Should a party elect a jury trial or request punitive damages, attorney's fees would not be awarded pursuant to section 2678, liquidated damages would not be available, and the United States would be free to raise the absolute or qualified immunity of its employees as a defense to the claim.

Section 13

Section 13 adds a new chapter to Title 5 of the United States Code giving persons the right to initiate and participate in disciplinary inquiries of federal employees upon a demonstration or claim that the person has been subjected to a tort arising under the Constitution as a result of the act or omission of the federal employee being disciplined. The section is intended to serve as a counterpart and a supplement to sections 1 through 12 which would make most federal employees immune from civil liability for their acts or omissions giving rise to constitutional torts. Section 13 ensures that federal personnel who act within the scope of their authority or with a reasonable good faith belief in the lawfulness of their conduct will remain accountable for any constitutionally tortious conduct by replacing the possibility of civil liability with the more certain likelihood of a disciplinary inquiry triggered and participated in by the aggrieved party. In addition, Section 13 ensures that other employees who will be immunized from personal liability as a result of a plaintiff's decision to elect to sue the United States instead of the employee will also be held accountable for tortious constitutional conduct.

Section 7801 defines "person," "federal agency," "employee," "appointee of the President," and "disciplinary action." The word "person" is defined to mean any person with rights recognized under the Constitution of the United States. The definition is intended to include all

natural persons as well as corporate or organizational entities to whom the courts may ascribe constitutional rights capable of supporting a cause of action based upon tortious injury arising under the Constitution. The word "employee" is defined to include appointees of the President whose nominations are not subject to the advice and consent of the Senate, such as employees in the Executive Office of the President. Employees whose nominations are subject to Senate confirmation fall within the definition for the term "appointee of the President."

Section 7802 sets forth the circumstances under which a person can initiate an administrative inquiry into the conduct of an employee alleged or found to have caused tortious injury under the Constitution. Three situations are available. Under the first, set forth by section 7802(a), a person must have obtained a monetary recovery from the United States on an administrative claim under section 2675 or from suit under section 1346(b) of title 28, United States Code, where the award was for tortious injury arising under the Constitution. Under the second circumstance, described in section 7802(b), a person need only bring suit under section 1346(b) on a tort claim arising under the Constitution. Under the third, set forth in section 7802(c), the person may be invited to participate by an agency which has initiated its own administrative inquiry prior to initiation by the complainant.

The rights of a person to participate in and seek administrative and judicial review of the administrative inquiry are dependent upon the particular subsection of 7802 which triggered the person's involvement. A request or invitation to participate in an administrative inquiry under sections 7802(a), (b), or (c) entitles a person to all of the participatory opportunities set forth in section 7803(b). The rights of a claimant proceeding under sections 7802(a), (b), or (c) do not become distinguishable until after the agency inquiry has terminated. At that point, only the person proceeding pursuant to section 7802(a) may seek administrative or judicial review. A person participating in an agency's administrative inquiry pursuant to sections 7802(b) or (c) may not seek administrative or judicial review unless the employing agency consents, until the person obtains a monetary recovery under the terms of section 7802(a) during or subsequent to the inquiry, or unless the employing agency or a court of the United States has found that the claim arises under the Constitution. A hiatus in the disciplinary review process is necessary only in cases in which the threshold question of whether a constitutional tort has been committed is at issue. The requirements of a monetary recovery or a finding that a constitutional tort has been committed are considered necessary to screen out frivolous complaints. In all other cases, review of the employing agency's action, or inaction, may proceed without delay. Section

7803(e) determines the right of a person to seek administrative and judicial review of an agency's administrative inquiry.

In recognition that an aggrieved person may have to indure several years of litigation prior to establishment of injury and receipt of an award, section 7802(b) permits such an individual to initiate and participate at the agency level in a disciplinary inquiry sixty days after an action for unconstitutional tortious conduct is filed. This provision is also designed to weed out frivolous complaints. An agency may take up to six months to process an administrative claim. This section requires the person to file suit under section 1346(b)--which cannot be done until the claimant has exhausted the administrative process--and wait an additional sixty days before his right on administrative inquiry vests.

Section 7802(c) permits an agency in its discretion to invite a potential claimant to participate in an administrative inquiry in order to ensure that the employee whose conduct is being investigated will not be subjected to a second disciplinary inquiry should the potential claimant subsequently obtain a monetary award or file suit and initiate a later administrative inquiry under 7802(a) or (b). Agencies should not wait to initiate an administrative inquiry until forced to do so. To prevent duplicative proceedings when an agency invites a person to participate, section 7802(d) provides that a person who participates in an administrative inquiry by filing suit under 7802(b) or by agency invitation under 7802(c) may not subsequently exercise any right under 7802(a) or (b) to request a second administrative inquiry into the same conduct.

Section 7803 sets forth a person's responsibilities and rights with respect to participation at an agency inquiry and subsequent administrative and judicial

review. The process contains three stages with the first being the agency inquiry conducted by the agency which employs the individual alleged or suspected of having committed a constitutional tort. The second stage is a review proceeding conducted by one of several administrative reviewing bodies independent of the agency which conducted the initial inquiry. The third level is review by a federal court.

Section 7803(a) requires the person requesting an administrative inquiry under 7802(a) or (b) to submit as full and complete a statement of relevant facts as is known to the complainant. As a screen to frivolous requests for disciplinary action, the complainant's written statement must be certified and subscribed. If the person requesting the inquiry does not know the identity of some or all of the employees who have committed a constitutional tort, he still may request that an administrative inquiry be initiated. He must, however, provide sufficient information to permit the agency to initiate such inquiry. If the agency is unable to respond to the request, it should first seek additional information from the person. If such efforts are unavailing, the agency may dismiss the complaint as provided under section 7803(b).

Section 7803(b) requires the agency inquiry to proceed without unnecessary delay. An inquiry lasting no longer than sixty days would seem appropriate for a single, well-identified constitutionally tortious act, such as a warrantless entry in violation of the Fourth Amendment. Where the conduct in question was continuing in nature, involved a large number of individuals, or occurred far back in time, the agency inquiry might be expected to exceed sixty days but only in exceptional circumstances should it exceed 180 days. The section contemplates that agencies will give prompt attention to requests for disciplinary inquiries brought under subsections 7802(a) and (b) and to proceedings initiated by the agency soon after the action is filed, pursuant to subsection 7802(c).

The head of the agency or his designee is given discretion to control the depth and breadth of the inquiry depending upon the merits of the claim and the extent of disputes over material questions of fact. If after a preliminary inquiry the head of the agency or his designee determines that a complainant's claim of constitutional injury is clearly unsubstantiated, the inquiry may be summarily terminated upon notice to the claimant under this section. If, however, a preliminary inquiry reveals a genuine, material, and substantial dispute of fact which can be resolved with sufficient accuracy only by the introduction of reliable evidence in a hearing, then a hearing must be held to resolve the dispute. A failure of an agency to hold a hearing under such circumstances shall be grounds for appeal by the complainant to the reviewing administrative body or federal court which may instruct the agency to hold a hearing.

In the event a hearing is held, the head of the agency or his designee may permit the complainant to examine or cross-examine witnesses or suggest witnesses to be called or documents to be produced. The decision of an agency not to permit a complainant to examine and cross-examine witnesses or to produce witnesses or documents suggested by a complainant will be final and not subject to review by an administrative body under 7803(c), or by a court under 7803(d) except to the extent that the administrative reviewing body or the court concludes that the record developed by

the employing agency was inadequate to resolve the issue of the propriety of disciplinary action against the employee.

In many cases examination of a witness by the complainant may be of assistance to the agency and is to be encouraged. In a few cases, examination or even knowledge by the complainant of the identities of other witnesses examined by the agency, including the substance of their testimony, could impair the overall functioning of the agency. Examples include testimony revealing targets of on-going criminal investigations, informants' identities, identities of employees acting in an undercover capacity, intelligence sources and methods, military and state secrets, and other information normally privileged from disclosure to a plaintiff in the course of civil litigation. The nature of such information which is germane to an agency's inquiry must nevertheless be recorded for review by the administrative reviewing body or a federal court in the event of an appeal by a complainant dissatisfied with the action taken by the agency.

The head of the agency of his designee must prepare a statement of findings and the reasons for the decision on discipline in every case in which disciplinary proceedings are conducted under subsections 7802(a), (b), or (c). Where a case is summarily dismissed, this notice must still be given.

Section 7803(c) provides for an independent review of an agency's administrative inquiry by one of six bodies set forth in section 7805. The administrative reviewing body shall conduct the review without delay and may substitute its judgment for that of the employing agency in regard to the appropriate nature and degree of discipline. In the course of its review, the administrative reviewing body shall assess the adequacy of the record developed by the employing agency. If the record is inadequate, the reviewing agency may remand the case to the agency for further proceedings. In the alternative, the reviewing body may remand the record to the agency for further proceedings or, in its discretion, the reviewing body may supplement the record by taking additional evidence either in written form or through a hearing. Supplementation of the record may include taking testimony from witnesses who appeared in the employing agency proceeding but whose credibility may be an issue in the decision on adequate discipline or from witnesses who did not appear before the employing agency. Vesting the administrative review body with the authority to independently supplement the record is intended to accommodate situations in which a relevant

piece of evidence or course of inquiry may have been unintentionally overlooked by an agency during its review, or cases where the record submitted suggests a less than full and vigorous investigation of a seemingly meritorious complaint by an agency. Such review is not de novo review in the sense that the reviewing agency need not disregard all that has occurred prior to its review.

A reviewing body may affirm the action taken by an agency, impose discipline if none was ordered, or adjust the type of discipline imposed by the agency, except where an agency's employees have no right under other provisions of law to seek administrative review of discipline entered against them. In such instances, section 7807(d) provides that the administrative reviewing body may increase but not decrease the severity of the disciplinary action imposed. The reason for restricting the authority of the administrative reviewing body to reduce the severity of discipline is to maintain the current status of those employees who are part of an exempted service and not permitted to challenge the degree of discipline imposed by their agencies.

Section 7803(d) provides for judicial review of a final decision by the reviewing body. A court may affirm the decision of the reviewing body or set it aside and remand the case to it or to the employing agency for further proceedings if it finds the decision arbitrary or capricious, or finds material factual determinations unsupported by substantial evidence. The court's review will be limited to an examination of the record compiled by the employing agency and administrative reviewing body.

Provision is made for in camera review of those portions of the record normally privileged from disclosure to a private party in the course of civil litigation. This subsection gives the complainant full and complete standing to seek judicial review of the reviewing body's action.

Section 7803(e) limits the right of review by an administrative body and a federal court to persons who have obtained a monetary recovery from the United States on a claim under section 2675 or on a suit under section 1346(b) of title 28, United States Code, allegedly arising under the Constitution of the United States or to persons whose claims have been determined by the agency or a court to have arisen under the Constitution. The purpose of the subsection is to screen out claims lacking merit and to allow only those persons with substantiated constitutional tort claims to institute an independent review of an agency's administrative inquiry into alleged wrongdoing.

An agency which has invited a potentially aggrieved person to participate in an administrative inquiry may in its discretion under section 7803(e) permit the person to seek administrative and judicial review even if the above prerequisites to review have not otherwise been met. The provision is intended to protect an employee whose conduct has been the subject of the agency's disciplinary inquiry from being subjected to a second round of examination at an uncertain point in the future. An agency's decision not

to permit a party to obtain review of its action when the person has no independent right to do so is not reviewable by an administrative body or a court.

The provision of section 7803(e) regarding "alleged" constitutional torts covers cases where the United States awards damages but refuses to admit that a constitutional tort has been committed. The provision regarding an agency or court finding covers cases where litigation is proceeding solely on the issue of the amount of damages to be awarded.

Section 7804 sets forth procedures for examining the conduct of former employees and current and former presidential employees, as defined in section 7801, who for constitutional and jurisdictional reasons are beyond the reach of normal disciplinary procedures contemplated by section 7803. Section 7804 permits an aggrieved person to request one of six administrative reviewing bodies described in section 7805 to investigate the alleged improper conduct, hold a hearing, made findings, and publish them in a report. A finding of improper conduct would constitute a public reprimand thereby serving as an indirect sanction for the offending conduct. This sanction may be imposed regardless of the result in a suit filed under subsection 1346(b) of title 28 against the United States or against the employee for a claim arising under the Constitution.

In order to ensure that a former employee or current or former presidential appointee is not unfairly charged with improper conduct, section 7804(b) permits the individual whose conduct is the subject of the report to submit a statement in rebuttal to the reports' finding which shall accompany the report upon its public release. The complainant and the employee may seek judicial review of the report under section 7804(c). The Committee concludes that there is no barrier to the standing of either party in such an action.

Section 7805 identifies the independent administrative reviewing body or individual which will review the administrative inquiry of an employing agency under section 7803(c) or the conduct of a former employee or a current or former presidential appointee under section 7804. The section contemplates that unless otherwise specified, the reviewing body will be the Civil Service Commission. Five separate reviewing bodies or individuals are designated in addition to the Civil Service Commission to handle disciplinary inquiries of a specialized nature. These include the Secretary of Defense for uniformed members of the Armed Forces, the Secretary of the Department in which the United States Coast Guard is operating, the head of an agency with a personnel system under the Foreign Service Act of 1946, the head of an agency with a personnel system under the Public Health Services Acts, and a presidentially appointed body to review the conduct of an officer or employee while engaged in intelligence activities.

The section does not contemplate an election of reviewing bodies or individuals by the employee or complainant. However, where an employee is engaged in both law enforcement and intelligence collection activities, law enforcement conduct alone would be reviewed, for example, by the Civil Service Commission and intelligence conduct by a presidentially appointed body. In this case the appropriate reviewing body will be

determined by the employing agency based on the predominant character of the employee's conduct that is the subject of the agency's administrative inquiry.

In order to ensure that the administrative review is conducted independently of an agency's inquiry, section 7805(g) provides that the agency head or its designee conducting the review shall not be responsible to or subject to the supervision or direction of the agency designee who conducted the administrative inquiry under review.

Subsection 7805(h) specifies that the body designated to conduct administrative review of the conduct of intelligence agents shall not have in its membership any person who has been an employee of the Federal Bureau of Investigation and specified intelligence agencies during the two years preceding appointment to the body. This requirement is designed to ensure that this body be independent of the intelligence agencies for which it has review authority. At the same time the Committee recognizes that this body must have experience with the unique problems of intelligence agents. Sections 7805(3) and (h) balance these interests. In addition, the staff of this body is not subject to the two-year requirement in subsection (h).

Section 7806 provides for the implementation of regulations to effectuate Section 13 of the Bill. The section intends a two-stage implementation of regulations. In the first stage, the administrative reviewing bodies described in section 7805 will propose regulations within ninety days of the Section's enactment. These regulations are to be followed within sixty days after the effective date of the reviewing bodies' regulations by regulations by each federal agency. These agencies' rules must be consistent with the regulations issued by the appropriate administrative body designated by section 7805

to revise the agency's disciplinary actions under section 7803(c). An agency's own rules, regulations, and instructions will not only be consistent with those of its designated reviewing body, but will also be tailored to meet its particular agency function and structure.

Under the provision of subsection 7805(b), the Civil Service Commission will review the disciplinary actions of such federal law enforcement agencies as the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco and Firearms, the U.S. Customs Service, the Immigration and Naturalization Service, and the Drug Enforcement Administration.

To ensure that potential complainants will be able to comment upon these regulations, we have required under subsection 7806(d) that all proposed regulations issued pursuant to section 7806 be published for public comment and subject to judicial review under the provisions of chapter 5 and 7 of title 5, United States Code. In the event that the body designated by the President to review intelligence agency disciplinary proceedings is not already covered by the Administrative Procedure Act, section 7806(c) requires it to publish its regulations for comment under the A.P.A.

Section 7807 sets forth several miscellaneous provisions intended to clarify the effect of Section 13 on existing disciplinary procedures. Subsections 7807(a)-(c) are intended to make clear that no right otherwise available under law to an employee respecting disciplinary action will be abridged by provisions of Section 13. An employee who has a right under law to appeal a disciplinary action taken against him to the Civil Service Commission and then to a federal court would continue to have that right. In order to expedite the process, however, section 7807(a) provides

that in the event a complainant seeks administrative review by the Civil Service Commission under Section 7803(c), the employee would not have to appeal to the Commission's Board of Appeals and Review prior to seeking judicial review. Subsection 7807(a) specifies that the complainant's right to participate in disciplinary proceedings extends to the disciplinary rights exercised by an employee under other provisions of law.

In those instances where an employee would normally not be entitled to seek administrative review of the disciplinary action imposed against him by his agency, section 7807(b) provides that in the event a complainant seeks administrative review under section 7803(c), the employee shall be given all the rights of participation accorded the complainant. In such instances, however, an employee could seek judicial review to the extent provided by section 7803(d) if the discipline imposed by the reviewing body under section 7803(c) was greater than that imposed by the employee's agency under 7803(b). If the reviewing body affirmed the level of discipline imposed by the employing agency, the employee would not be permitted to seek judicial review. Such a result would be inconsistent with the fact that the employee would not otherwise have a right to seek judicial review of the discipline imposed by his agency. Should the complainant petition for judicial review in such a case, the employee would still not be permitted to

participate for the reason that his interest in not increasing the amount of discipline imposed by his agency will be adequately represented by the agency during the judicial review process. The employee's interest in reducing the severity of the discipline will be of no importance because of his inability to seek judicial review under other provisions of law in the first instance.

Sections 7807(a) and (c) recognize but do not attempt to resolve procedural conflicts that may arise when an employee pursues a course of review separate from that available to a complainant. Examples of such may include an employee electing to appeal a decision of the Civil Service Commission made under section 7803(c) directly to the Commission's Board of Appeals and Review while the complainant seeks immediate judicial review under section 7803(d), or an employee electing to pursue judicial review before the United States Court of Claims while the complainant procedes before a United States district court. Section 7807 contemplates that resolution of the conflicts will turn on the particular circumstances of each conflict with appropriate courts or administrative bodies exercising their equitable powers to stay proceedings in the interest of comity and expeditious resolution of matters in dispute.

Section 7807(c) provides that no part of Section 13 of the Bill is intended to adversely affect the availability of defenses which an employee may otherwise raise in any administrative or judicial proceeding. The section is

intended to make clear that defenses such as an employee's good faith belief in the propriety of his conduct, which would normally be available to mitigate or eliminate the imposition of disciplinary sanctions, remain available even though Section 3 of the bill precludes their assertion by the United States in defense of a civil action alleging a tort arising under the Constitution.

Section 7807(d) and (e) are intended to ensure that an agency will not delay the initiation of a disciplinary inquiry independently of a request by an aggrieved party. The purpose of Section 13 is to ensure that a valid administrative inquiry into possibly offending acts or omissions takes place whenever just cause exists to believe improper and constitutionally tortious conduct has occurred. While the purpose is effectuated by providing for citizen initiation and participation in the inquiry, it would be anamolous to the Section's intent to discourage an agency from taking independent action prior to citizen initiation or in the event the citizen chooses not to initiate such a complaint. A salutary aspect of the Section should be to encourage agencies to undertake early and vigilant review of possibly improper conduct in order to avoid probable but yet belated examination through victim involvement.

Section 7806(f) provides for an annual report by the President to the Speaker of the House and the President of the Senate listing for each federal agency the number

and description of administrative inquiries undertaken pursuant to Section 13, and the disposition of each inquiry including the results of administrative and judicial review.

Section 7807(g) provides for the recovery from the United States of reasonable attorneys' fees and other reasonable costs of litigation incurred during judicial review under section 7803(d) or 7804(c) where the person seeking judicial review is afforded the relief sought in substantial measure. Attorneys' fees and related costs may not include fees and costs incurred at the agency or administrative review levels under sections 7803(b) or (c).

REPORT
(To accompany S.3314)

The Committee on the Judiciary, to which was referred the Bill (S.3314) to amend title 28 of the United States Code to provide for a remedy against the United States in suits based upon acts or omissions of United States employees arising under the Constitution, and for other purposes, having considered the same, reports favorably thereon, without amendment, and recommends that the Bill do pass.

PURPOSE

S. 3314 would amend the Federal Tort Claims Act to make the United States the exclusive defendant in suits arising from common law torts of Government employees. It would also extend the coverage of the Act to permit aggrieved parties to bring actions against the United States for torts arising under the Constitution. The United States is made exclusive defendant in such suits under certain circumstances. In addition, the Bill would add a new chapter 78 to title 5, United States Code, which would authorize the victims of certain torts arising under the Constitution of the United States to initiate an agency disciplinary proceeding against the offending employee.

BACKGROUND OF SENATE BILL S.3314

On September 16, 1977, the Attorney General transmitted a draft bill to the Vice President "To amend title 28 of the United States Code to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, and for other purposes." (See Hearings, Part 1, at 26-38.) Senator Eastland introduced the draft bill on September 21, 1977 as S. 2117, which was then

referred to the Committee's Subcommittee on Citizens and Shareholders Rights and Remedies. That Subcommittee, together with the Committee's Subcommittee on Administrative Practice and Procedure, held joint hearings on January 26, 1978, and on June 15, 1978. On July 19, 1978, S. 3314, a clean bill was introduced by Senator Howard M. Metzenbaum, Chairman of the Subcommittee on Citizens and Shareholders Rights and Remedies. On July the clean bill was reported to the full Committee.

A proposal similar to S. 3314 to amend the Tort Claims Act were first submitted by the Justice Department in the 93rd Congress. (See Hearings, Part I, at 8-9 and 215-219.) That bill was virtually identical to the bill proposed by the Department in this Congress. Both proposals, however, are part of a recent trend of legislation to insulate Federal employees and government contractors from personal liability for performance of their official duties. A brief review of the evolution of the Tort Claims Act is useful in understanding the present bill.

The Federal Tort Claims Act itself became law as Sections 401-424 of the Legislative Reorganization Act of 1946, Public Law 79-601. That Act was the culmination of years of efforts to reform the chaotic system of using private bills to compensate victims of torts by Federal employees. (See "Organization of Congress," Hearings before the Joint Committee on the Organization of Congress, Seventy-Ninth Congress, First Session, Part 1 at 67-69 and 95, Part 2 at 218-219, 241, 341, and 369-370, Part 3 at 598 and 696-697, and Part 4 at 906-909, 936, and 1024; Senate Report 79-1011 (Final Report of Joint Committee on the Organization of Congress) at 25; Senate Report 79-1400 (S. 2177, the Legislative Reorganization Act of 1946) at 7 and 29-34; 92 Congressional Record at 6372-6373 (June 6, 1946), at 10039-10040, 10072, and 10091-10094 (July 25, 1946); and 35 Georgetown Law Journal, 1-67 (1946).)

By waiving the sovereign immunity of the United States to permit such claims to be made to the various Federal departments, Congress relieved itself of the burden of considering private bills.

In the Eighty-Sixth and Eighty-Seventh Congresses amendments to the Tort Claims Act were considered to relieve certain individual Federal employees from personal liability for torts committed in the performance of official duties. Under the Tort Claims Act of 1946 there was no procedure in cases where an employee was sued in his individual capacity to substitute the United States as the sole defendant in lieu of the employee. This loophole resulted in great personal hardship for those employees. In the Eighty-Sixth Congress a bill to provide immunity from civil suits was adopted. However, the bill was vetoed by President Eisenhower because it failed to give Federal employees immunity from civil suits filed in State courts. (See H. Rept. 86-581 .) In the Eighty-Seventh Congress the bill was again adopted but was amended to avoid a second veto. (See H. Rept. 87-297; S. Rept 87-736; and Public Law 87-258 (September 21, 1961), 75 Stat. 539.) The problems which led to the 1961 amendments are strikingly similar to that which has led to the legislative proposal considered here.

The House Report explained that "under normal circumstances the injured party prefers to bring his [tort] action against the United States rather than against a man of limited resources...." (H. Rept. 87-297 at 2-3). Although the "judgments involved [were] for relatively small amounts...those judgments work a real hardship on the employee." (Id. at 3).

> While the Government has adopted a general policy of affording counsel and representation to employees sued in this manner, this does not help when a judgment has been entered against the man. The employee is then faced with the alternative of settling the judgment or of prosecuting an appeal. Because of the additional expense and difficulty involved with an appeal, the employee is often forced to settle the matter by paying the judgment. (Id. at 3).

The Report found that "the liability of its employees is a matter of direct concern to the United States [because] the threat of this sort of liability....has an adverse effect on the efficacy and morale" of Federal employees. (Id. at 3).

The 1961 amendments attempted to alleviate the hardship of Federal employees by permitting the Attorney General to substitute the United States as the sole defendant in certain cases brought against Federal employees. This substitution was accomplished by permitting the Attorney General to certify to the court in which the case was pending that the employee was "acting within the scope of his employment at the time of the incident out of which the suit arose...." (See 28 U.S.C. 2679(d)). Upon such certification the United States would be substituted as the sole defendant in lieu of the employee. Thus, use of the certification procedure is the equivalent to immunizing a Federal employee from personal liability.

The issue which led to the initial veto of the legislation involved the question of whether the Attorney General could use the certification procedure to deprive State courts of jurisdiction over tort claim actions against Federal employees. The Senate bill had provided that the Attorney General could remove a case to Federal court and substitute the United States as the sole defendant only "with the consent of the plaintiff...." (See Senate Report 87-736 at 18.) Obviously, this provision preserved a major loophole in the Government's effort

to immunize certain Federal employees. A compromise on the issue was reached whereby the Attorney General's certification was to be dispositive only until a hearing could be held on a "motion to remand held before a trial on the merits" to determine whether the employee was, in fact, "acting within the scope of his employment". (See 107 Congressional Record at 18499-18501 (September 7, 1961).)

The major limitation in the 1961 amendments was that it permitted use of the certification procedure only for tort actions "for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle...." (See 28 U.S.C. 2679(b)). This limitation excludes tort actions for invasions of constitutional rights or for the misconduct of employees other than Federal drivers. For this reason the 1961 amendments are commonly referred to as the "Drivers Act".

Subsequent to the Drivers Act, the certification procedure was extended to torts committed by other employees of the Government. In 1965, malpractice suits against medical personnel of the Veterans Administration were covered. (See Public Law 89-311, 79 Stat. 1154, and 38 U.S.C. 4116.) In 1970 medical personnel employed by the Public Health Service were given immunity (Public Law 91-623, 84 Stat. 1868, and 42 U.S.C. 233). Finally, in 1976 medical personnel in the State Department, Defense Department, and Central Intelligence Agency were brought under the certification procedure. (See Public Laws 94-350 and 464, 22 U.S.C. 817, 10 U.S.C. 1089, and 42 U.S.C. 2458a.) Also in 1976, manufacturers of swine flu vaccine were given immunity. (See Public Law 94-380, 42 U.S.C. 247(b).).

Each of the amendments described above dealt with the extent to which the certification procedure could be used to immunize Federal employees or contractors. Of equal importance here are recent amendments to the Tort Claims Act which extended the liability of the United States to encompass torts not previously covered by the Act. In 1974 an amendment to the Act was adopted which, for the first time, permitted

plaintiffs to sue the United States for constitutional torts committed by investigative or law enforcement officers. As enacted in 1946, the Tort Claims Act permitted plaintiffs to sue the United States for "money only...on account of damage to or loss of property or on account of personal injury or death...." (See Public Law 79-601.) This general definition of United States liability has remained unchanged to this day.

Rather than amend this provision, however, in 1974 Congress nullified the effect of one of the exceptions to this general definition of liability. Since 1946 the general definition of United States liability had been subject to a list of exemptions. (See 28 U.S.C. 7680.) One of the exemptions precluded suits against the United States for any claim "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process" and other Constitutional torts. In 1974 this exemption was waived for these torts when committed by investigative or law enforcement officers. In other words, plaintiffs were given authority to bring suit for these torts against the United States. (See Public Law 93-253, 88 Stat. 50; S. Rept. 93-588; 120 Congressional Record 5285-5290 (March 5, 1974).)

At the same time as the Congress extended the liability provisions of the Tort Claims Act to cover constitutional torts, the certification procedure was left unamended. The result of this fact is that although persons aggrieved by certain constitutional torts by law enforcement officers may bring suit against the United States under the Tort Claims Act, they are not required to do so. The Attorney General may not use the certification procedure to immunize law enforcement officers sued in their individual capacity.

With the 1974 amendments the gaps in the certification procedure are greater than the gaps in the liability provision. Although almost all common law tort suits and many constitutional tort suits may be brought against the United States, the certification procedure can only be employed for drivers, medical personnel, and manufacturers of swine flu vaccine. The limitation on the use of the certification procedure has become a serious issue because plaintiffs have been successful in establishing new rights to bring tort suits against Federal employees in their individual capacity. Most significant among the cases subjecting Federal employees to suit are the Bivens and Economou cases.

In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court recognized, for the first time, an aggrieved person's right to bring a damage action against a Federal employee for violations of the person's constitutional rights. The court reiterated its observation in Marbury v. Madison that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." (Bivens, supra, at 388.) In the recent case of Butz v. Economou, ___U.S.___ (June 29, 1978), the Supreme Court reaffirmed its holding in the Bivens case but held that Federal officials could avoid liability if they acted with a reasonable good faith belief in the lawfulness of their conduct. As a result of the Bivens and Economou cases and the violations of civil liberties by the Federal Bureau of Investigation, Central Intelligence Agency, and other agencies, hundreds of lawsuits have been filed against Federal officials in their individual capacity.

Although the Attorney General presently has some authority to permit constitutional tort suits to be brought against the United States, he has no authority to require that consitutional tort suits be brought against the United States rather than the employee. The limitations in both the liability and immunity provisions of the Tort Claims Act, but particularly the latter, have led the Justice Department to propose the Bill considered here.

STATEMENT

As explained above, the Federal Tort Claims Act now makes the Government liable "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[1/] However, except for the Drivers Act, nothing in the existing Tort Claim Act prevents the plaintiff from also bringing suit against the individual employee or from bringing suit against the employee and not the United States. (See Butz v. Economou, ___U.S.___ (June 29, 1978).)

This Bill extends the liability of the United States to all constitutional torts and extends the certification procedure to all common law and most constitutional torts. With respect to constitutional torts, the Committee declines to authorize the Attorney General to use the certification procedure to immunize all Federal employees for constitutional torts they commit regardless of whether the tort is committed in good or bad faith. For constitutional torts not committed by an employee with a good faith belief in the lawfulness of his actions within the scope of his authority, therefore, such employee would remain subject to suit at the election of a plaintiff. In addition, in all cases in which tortious unconstitutional conduct by a presidential appointee or a former employee is alleged, the injured party may elect to sue either the present or former employee or the United States. The Committee believes even in those cases, however, that most plaintiffs will elect to sue the United States rather than the employee. This likelihood, together with the use of the certification procedure to immunize Federal employees acting in good faith or within the scope of their authority, will have the effect of immunizing

---

1/ 28 U.S.C. 1346(b).

nearly all Federal employees from constitutional tort suits. Lest this grant of immunity reduce the accountability of Federal employees, the Justice Department has proposed and the Committee has adopted a new procedure to guarantee that Federal employees who violate the constitutional rights of private persons will be disciplined by the Government.

Extending the coverage of the Federal Tort Claims Act to include all constitutional torts and making the United States the exclusive defendant in most such cases will have the following consequences. First, it will no longer be necessary for the Government to retain private attorneys to defend employees who are defendants in lawsuits. Second, with the employee no longer a party in interest, many meritorious claims can be settled by the Government short of litigation. In addition, plaintiffs will find it easier to recover on meritorious claims because the United States is barred from raising the good faith of an employee as a defense to an action against it and because liquidated damages will be awarded when plaintiffs are unable to prove actual damages. Third, Federal employees will be immunized from the threat of crippling lawsuits challenging actions taken in good faith while in government service.

RETENTION OF PRIVATE ATTORNEYS

The most immediate and concrete result of adoption of this Bill will be the reduction, if not the elimination, of the need for the Department to retain private legal counsel to represent Federal employees sued in their individual capacities. The Justice Department's private counsel program has been criticized justifiably in a staff report of the Subcommittee of Administrative Practice and Procedure entitled "Justice Department Retention of Private Legal Counsel to Represent Federal Employees in Civil Lawsuits".

The Justice Department has a long-standing policy of representing Federal employees in civil lawsuits for conduct performed within the scope of their employment. On January 19, 1977, Attorney General Levi issued a statement of policy which defined, for the first time, certain circumstances in which the Department will retain, at its expense, private legal counsel to represent these employees when sued in their individual capacity. This extension of previous Department policies and practices has created as many problems as it has solved.

The Government's policy of defending employees when sued for acts performed in the line of duty is normally met by the use of Department of Justice attorneys. However, private counsel have to be retained if the interests of the defendant employee require a defense that conflicts with broader policy interests of the United States. The Department recognizes that this conflict arises when a Federal employee desires to raise a legal argument which conflicts with the interests of the United States. Private attorneys may also have to be retained if the conduct that is questioned in the civil suit is the subject of a Department of Justice criminal investigation.

In other situations, more than one employee may be sued, and the defendant employees may give conflicting accounts of the underlying facts. In each case because ethical considerations prevent government attorneys from representing the employee, the government has decided to retain private counsel at its expense.

The Attorney General stated before this Subcommittee:

> The cost of private counsel is proving to be a highly expensive undertaking even though the maximum fees we have persuaded private attorneys to accept are frequently less than half their normal rates. In fiscal 1977, the Department spent over $600,000 in private counsel fees. In the first quarter of the current fiscal

year, the Department paid approximately $240,000 in fees. If the first quarter figures continue at their present rate through the remainder of fiscal 1978, we will be experiencing a 60 percent increase in private counsel fees. 2/

Other problems aside from cost have arisen with the private counsel program.

The Administrative Practice Subcommittee Report on the private counsel program presents a forceful argument that the Justice Department has no statutory authority to retain private counsel who are independent of the Department's supervision and control. Although the General Accounting Office has held that the Department has such authority, the question may well be litigated. If the Department is held to be without such authority, chaos would result.

In addition, the independence of private counsel itself creates problems. Although the private counsel must be given some independence to avoid the conflict which prevents representation by Department attorneys, private counsel then are free to raise legal arguments which the Department believes are not in the interests of the United States to assert. Among these arguments is the defense of "superior orders". When private counsel retained by the Department raise such arguments, the public interest in representing such Federal employees is diminished.

Making the Federal Government the exclusive defendant in most tort claims cases will enable the Government both to save the ever-increasing costs of private counsel and to avoid the other problems associated with this policy. No longer will the individual defendant be compelled to force the Government and the plaintiff into expensive litigation to protect himself from liability. No longer will the Department of Justice, and our taxpayers, be forced to subsidize private attorneys who are obligated to raise all possible arguments on behalf of their clients even though those arguments are inconsistent with the litigation policies of the Federal Government.

2/ Hearings, Part I, at 7.

EFFECT UPON TORT PLAINTIFFS

Enactment of S. 3314 would do more than just relieve the Government of the expense of retaining private counsel. The Bill contains a number of provisions which should make it easier for a tort plaintiff with a meritorious claim to recover against the Government. As stated above, the Ninety-Third Congress extended the Tort Claims Act to cover certain constitutional torts committed by Federal investigative or law enforcement officers. Section 3 of S.3314 would remove all remaining questions about the Act's coverage of various torts by extending the coverage of the Act to all torts "arising under the Constitution of the United States."[3/]

3/ See Boger, Gitenstein, and Verkuil, "The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis," 54 N.C.L.R. 496 (1976). The Committee has not been able to arrive at a more specific definition of "constitutional tort" than a claim sounding in tort for money damages arising under the Constitution of the United States. It notes that the existing provisions of the Tort Claims Act do not describe precisely what is meant by "the negligent or wrongful act or omission of any employee of the government," but rather leaves that determination to be developed by state law. 28 U.S.C. 1346(b). Similarly, the Committee believes that the case by case development of Federal law is best left to the courts to determine what is included within the scope of "constitutional" torts.

Despite the provisions of the 1974 amendments, there remains some doubt about the ability of plaintiffs to bring suits for certain constitutional torts under the Tort Claims Act. For example, the 1974 amendments do not explicitly refer to the tort of invasion of privacy. The Justice Department has argued that invasion of privacy is not a tort covered by the Act. This argument was rejected in the Avery, Cruikshank, and Birnbaum cases. (See Hearings, Part I, at 306, 313, and 282, respectively.) However, other courts have been less favorable to plaintiffs, and several of these cases are on appeal.

Plaintiffs have additional problems in bringing suit under the Tort Claims Act when a constitutional tort was not committed by an "investigative or law enforcement officer". In such a case a plaintiff must invoke the jurisdiction of the Act as it existed prior to the 1974 amendment. In a series of such cases the Government has attempted to invoke the "discretionary function" exemption in Section 2680 and to argue that such torts were not committed within the scope of the employee's office or employment. For example, in the cases just cited the Department argued that Federal officials can have no discretion to commit unlawful acts, which the Department concedes was the case with the mail-opening program at issue in those cases. Again, the District Courts in these cases rejected these arguments and recognized the application of the Federal Tort Claims Act to constitutional torts committed by Federal employees other than investigative and law enforcement officers. Appeals are now pending in these cases.

One further burden on plaintiffs wishing to invoke the jurisdiction of the Tort Claims Act is the effort of the Department to raise the good faith defense available to an employee. In the case of Norton v. Turner the Department has argued that it may raise the good faith of an employee as a defense in an action brought under the Tort Claims Act. The District Court rejected this argument (See Hearings, Part I, at 315-351.). An appeals court has just reversed the District Court ruling.

As this review indicates, despite the 1974 amendments, there remains substantial uncertainty about the extent to which constitutional torts may be brought under the jurisdiction of the Tort Claims Act. This uncertainty will be eliminated by the Bill. To begin with, the Act is extended to cover all "torts arising under the Constitution." Secondly, the Act is extended to cover all such torts committed by an employee "within the scope of his office or employment or the color thereof." Finally, the exemptions listed in 28 U.S.C. 2680, including the "discretionary function" exemption, are waived in all constitutional tort cases.

The term "arising under the Constitution" is used to indicate that the Committee expects continuing evolution of the constitutional violations which will be held to constitute constitutional torts. In fact, the Committee favors an expansive definition of the term constitutional tort.

Several circuit courts of appeal and district courts have ruled that Bivens applies to all constitutional infringements. In United States ex rel Moore v. Koelzer, 457 F. 2d 892, 894 (3rd Cir. 1972), the ThirdCircuit applied Bivens to a Fifth Amendment violation, the falsification of documents offered into evidence against the accused in a criminal proceeding. The court said that Bivens "recognizes a cause of action for damages for violation of constitutionally protected interests, and is not limited to Fourth Amendment violations." Id. at 894. In Paton v. LaPrade, 524 F. 2d 862, 869-70 (3rd Cir. 1975), the Third Circuit also extended Bivens to a First Amendment claim involving F.B.I. mail surveillance.

In Kostka v. Hogg, 560 F. 2d 37 (1st Cir. 1977), the First Circuit stated that the Bivens Court methodology should be understood as "recognizing sweeping Federal judicial power to create damages remedies to vindicate constitutional rights." Id. at 42. In extending favorable dictum Bivens to the violation of Indian civil

rights for the barricade of an access road in Day Creek Lodge, Inc. v. United States, 515 F. 2d 926, 932 (10th Cir. 1975), the Tenth Circuit stated:

> We are cognizant of the fact that the claim at bar differs from those which were litigated in Bell v. Hood and in Bivens, but those decisions did not limit a consitutional action to a Fourth Amendment violation, ...

In States Marine Lines, Inc. v. Shultz, 498 F. 2d 1146, 1157 (4th Cir. 1974), the Fourth Circuit extended Bivens to the seizure of goods by Federal customs agents who failed to return it or institute forfeiture proceedings in violation of the Fifth Amendment due process clause. The court stated:

> The necessity and appropriateness of judicial relief is no less compelling in this case than it was in Bivens. As in Bivens: A common law or state tort remedy may or may not afford a means of redressing the wrong, but in any case, will not be tailored specifically to cases of lawlessness pursuant to Federal authority; the claim presented is obviously appropriate for money damages; and other remedies such as injunctive or relief in the nature of mandamus are no longer viable alternatives. Id. at 1157.

The Ninth and Fifth Circuits have also extended Bivens to Fifth Amendment violations. See Jacobsen v. Tahoe Regional Planning Agency, 558 F. 2d 928, 942 (9th Cir. 1977); Davis v. Passman, 544 F. 2d 865 (5th Cir. 1977).

Although the Second Circuit has expressly left the issue open, the case of Brault v. Town of Milton, 527 F. 2d 730, 734 (2nd Cir.), vacated on other grounds, Id. at 736 (1975) (en banc), found in Bivens a "sweeping approbation of constitutionally-based causes of action."

The Federal district courts have recognized a Bivens cause of action for a wide variety of constitutional infringements. These cases include:

1) Gardels v. Murphy, 377 F. Supp. 1389 (N.D. Ill. 1974) (First Amendment violation - interference by White House advance man with anti-war demonstration) ("Bivens recognizes a cause of action for damages for violation of any constitutionally protected interest").

2) Revis v. Laird, 391 F. Supp. 1133, 1138-39 (E.D. Cal. 1975) (Federal employment discrimination).

3) Johnson v. Alldredge, 349 F. Supp. 1230, 1231 (M.D. Pa. 1972), affirmed in part, reversed in part on another issue, 488 F. 2d 820 (3rd Cir. 1973) (access by prisoner to Federal courts).

4) Patmore v. Carlson, 392 F. Supp. 737, 739-40 (E.D. Ill. 1975) (Suit by Federal prisoner for beating and inadequate medical care).

5) Scheunemann v. United States, 358 F. Supp. 875, 876 (N.D. Ill. 1973) (Due process claim by fired postal employee).

The Committee favors an expansive reading of the Bivens remedy. It is clear that the reasoning upon which Bivens was based suggests that the same principles apply to other constitutional infringements by Federal officers as apply in Fourth Amendment violations. Because the Committee favors compensation to persons whose constitutional rights have been violated by Federal employees, it believes that as a matter of policy the Justice Department should not contest an expansive reading of the Bivens remedy. To do so will have the effect of limiting the benefits which this Bill will bring to victims of constitutional torts. Furthermore, it will encourage plaintiffs to continue to bring actions against Federal employees in their individual capacity whenever the certification procedure does not require substitution of the United States as a defendant.

In addition to clarifying the applicability of the Tort Claims Act to all constitutional torts, the Bill extends United States liability to acts committed by employees "within the scope of their office or employment, or the color thereof." As will be described below, the meaning of this term is very broad, particularly the words "the color thereof." The term will include every act of a Federal employee where he holds himself out to be a Federal employee, even if he has no authority to commit the acts which constitute a constitutional tort. In fact, the breadth of the term makes it

inappropriate to extend immunity to Federal employees operating "under color" of office. No similar issue is raised, however, about extending United States liability to constitutional torts committed "under color" of office. The Committee strongly believes that victims of constitutional torts committed by Federal employees should be compensated, even when the employee was acting "under color" of office. The "discretionary function" exemption in Section 2680 is waived for the same reason.

When a tort action is brought against the United States, other provisions in the Bill substantially increase the prospects that a plaintiff will, in fact, obtain a money judgment. The necessity of proving actual damage, as required in constitutional tort actions against individual employees, will be eliminated in Tort Claims Act cases by provision for a minimum liquidated damages computed at the rate of $100 a day for each day of violation not to exceed $25,000 or $1000 whichever is higher. Furthermore, successful constitutional tort plaintiffs will also be able to recover litigation costs and attorneys fees against the Government. Such costs and fees are rarely, if ever, recovered in actions against individual employees.

Of even more signficance, S.3314 specifically provides that the United States may not raise as a defense to a constitutional tort suit the absolute or qualified immunity of the employee (except that of Members of Congress, judges or prosecutors)[4/] or the employee's reasonable good faith belief in the lawfulness of his conduct. In other words, if the United States is answerable for the commission of a constitutional tort, it should compensate the victim, regardless of whether the employee was acting in good faith or whether he was acting under a personal absolute or qualified immunity. The ability of individual employees to raise a good faith defense has barred recoveries for all but a handful of plaintiffs in cases against such employees.

The Committee is just as concerned about the need to compensate the victims of constitutional torts as it is about the need to protect Federal employees from suit. In fact, these two interests are complementary. By providing an adequate remedy for victims of constitutional violations, the Bill will encourage plaintiffs to elect to

4/ These Government officials are entitled to absolute immunity. See Tenny v. Brandhove, 341 U.S. 367 (1951) (legislators); Pierson v. Ray, 386 U.S. 547 (1967) (judges); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors).

bring suit against the United States under the Tort Claims Act even in cases where they are not required to do so. Only by providing adequate compensation, with a minimum of maneuvering and litigation, will plaintiffs elect to bring suit under the Act rather than against the individual. To this extent, providing adequate compensation to victims is a prerequisite to alleviating the fear of Federal employees that they will be subject to suit.

EFFECT UPON FEDERAL EMPLOYEES

The rise in the number and scale of civil damage actions against government officials has been described as dramatic.[5/] Although the existence of a remedy for constitutional torts committed by Federal employees is itself of recent origin, plaintiffs have been quick to bring suits to vindicate their rights. The Committee believes that generally it is not in the public interest to have all Federal employees constantly faced with the possibility of a tort suit arising from the performance of their official duties. Some government employees, such as Federal Aviation Administration flight controllers have duties which have potentially catastrophic consequences; other employees, such as law enforcement personnel, are employed in situations which make them particularly vulnerable to tort complaints.

At the same time, the Committee is aware that the Supreme Court has held that "[i]n situations of abuse an action for damages against the responsible official can be an important means of vindicating constitutional guarantees." (Economou, supra, at .) As a result, the Supreme Court has fashioned a remedy for constitutional torts where an employee has not acted in good faith. In doing so the Court has taken note of the possibility that plaintiffs may attempt to use this remedy to harass Federal officials with frivolous law suits. The Court has rejected this

---

5/ Bermann, "Integrating Governmental and Officer Tort Liability," 77 Colum. L. Rev. 1175, 1180 (1977).

argument, however, finding that "[i]nsubstantial lawsuits can be quickly terminated by Federal courts alert to the possibilities of artful pleading." (Economou, supra, at .)

Although the Committee recognizes the validity of both the victim's and the employee's concerns, the threat of constitutional tort suits does deter improper conduct. Furthermore, in the wake of Watergate and revelations of massive violations of constitutional rights by the intelligence agencies, the Committee is extremely wary of any measure which might reduce deterrents to improper conduct, even if that measure would also reduce deterrence of proper conduct.

The Committee believes that it has struck a balance between the need to hold Federal officials accountable and the need to allay the fears of Federal officials. The balance which has been struck involves three provisions of the bill: the certification procedure, election of remedies provision , and the new disciplinary procedures.

As described above, the certification procedure permits the Attorney General to substitute the United States as the sole defendant in lieu of a Federal employee. At present the Attorney General may use the certification procedure only to immunize Federal drivers. The 1974 amendments did not permit the Attorney General to use the certification procedure to immunize investigative or law enforcement officers. This Bill authorizes the Attorney General to use the certification procedure in constitutional tort cases when he finds that the employee was "acting within the scope of his authority or with a reasonable good faith belief in the lawfulness of his conduct."

The meaning of this certification standard is crucial to the balance which the Committee has struck. The standard will permit the Attorney General to use the certification procedure only to immunize a Federal employee who has (1) committed

no constitutional tort or (2) committed a constitutional tort with a reasonable good faith belief in the lawfulness of his conduct. In either situation, a plaintiff could not successfully bring tort action against an employee. The Committee finds no public interest in permitting plaintiffs to bring constitutional tort suits in which they will be unsuccessful. Accordingly, this certification standard will permit immunity to be granted when a plaintiff probably would be unable to obtain a monetary recovery under existing law. Use of such certification will relieve Federal employees of the burden of defending themselves in litigation in which they are likely to prevail.

The Committee intends that the Attorney General will, in fact, be cautious in using the certification process. Given the strong incentives which plaintiffs will have to bring suit under the Tort Claims Act, they normally will bring actions against individual employees only in the most egregions or significant cases. If the plaintiff chooses to sue the individual employee, the plaintiff voluntarily has undertaken the burden to establish the absence of a reasonable good faith belief, to prove actual damages, and to forego attorneys fees. Therefore, it is not relevant to the certification that a plaintiff might benefit financially from substitution of the United States as the sole defendant.

In addition, the certification must be used cautiously to avoid giving any encouragement to Federal employees inclined to violate person's constitutional rights. When the Attorney General certifies that one employee has acted within the scope of his authority or with a reasonable good faith in the lawfulness of his conduct, other employees can safely assume that they will be given immunity for the same conduct. The ability of the Attorney General to regulate the conduct of Federal employees will, therefore, be undermined to the extent that the certification standard is not strictly applied.

In making the determination on certification the Attorney General must investigate the conduct of the employee. Without such a factual investigation, no determination to immunize an employee can or should be made.

The Committee is aware that when the Attorney General certifies that an employee was acting in "good faith," this certification may appear to be inconsistent with use of the new disciplinary procedure to discipline the employee or even with bringing criminal prosecutions against the employee. It is clear, however, that the Attorney General's certification has no relevance whatever to any subsequent disciplinary or criminal proceeding. Employees who have been given immunity from civil suits should not be able to raise that certification as a way to avoid accountability.

The Committee is also aware that there is an apparent irony in requiring the Attorney General to determine whether an employee was acting in good faith when the Bill provides that the United States may not raise a good faith defense once it is substituted as the sole defendant. This irony, however, is more apparent then real because the purpose of the certification process is to determine who should be liable and the purpose of waiving the good faith defense is to assure plaintiffs of a recovery. In addition, by waiving the good faith defense, most plaintiffs will be enticed to sue the United States in the first place, thus avoiding the need to apply the certification standard.

A more serious problem may arise in conducting the factual investigation on which the certification must be based. If there is a pending disciplinary proceeding or criminal investigation against the employee, it may not be possible for the Attorney General to question the employee. Any information the employee may divulge could be used against him in the Department's disciplinary proceeding or criminal investigation. This same conflict problem has arisen when the Attorney General has been asked to represent Federal employees sued in their individual capacity.

There are four ways around this impass: (1) presume that the employee was acting in "good faith"; (2) presume that the employee was not acting in "good faith"; (3) delay making the certification until the disciplinary proceeding or criminal investigation is complete; and (4) retain private control independent of the Department to interview the employee. In determining whether to represent a Federal employee the Department has employed both the first and the fourth of these methods. In using the certification proceeding it would seem that if the Department is conducting a disciplinary or criminal investigation, there is less need to presume against the presence of "good faith." However, delay or use of private attorneys would be preferable to presuming the existing of "good faith."

The "reasonable good faith" standard provides a two part test, the first objective and the second subjective.[6/] The objective test is to determine whether the employee has acted reasonably. To establish the reasonableness of an employees conduct, the Attorney General must look to whether the employee has acted in conformity with an openly declared legal command. Such a legal command may be found in a statute or judicial decision. It may also be found in reliance upon an openly declared administrative practice or upon administrative regulations. For example, an F.B.I. agent who violates the Attorney General's April 5, 1976, Guidelines for Domestic Security Investigations or his December 15, 1976, Guidelines on Use of Enforcements cannot meet the objective test. Similarly, an F.B.I. agent who violates other explicit provisions of the F.B.I. Manual of Investigative Operations, S.A.G. letters or memorandum, or even Airtels cannot show he acted in a reasonable good faith belief in the lawfulness of his conduct.

In cases where the legal restraints on an employee's conduct are not clear, the Attorney General must exercise his discretion on a case-by-case basis as to whether

---

6/ The Committee endorses the analysis of the good faith defense found at 5 Hofstra Law Review 501 (1977).

the employee's belief in the lawfulness of his conduct was reasonable. In such cases an employee may not rely on a "superior orders" defense. Such orders are "not per se the equivalent of statutory commands permitting an official to involve the objective good faith defense."[7/] Similarly, a mistake of law provides no basis for an objective good faith defense. The Committee specifically declares the inapplicability of the defense upheld in Barker v. United States, 546 F. 2d 910 (D.C. Cir. 1976).

The subjective part of the good faith defense will sometimes be difficult to apply. The Attorney General must determine whether or not the employee, in fact, believed he was "doing right."[8/] If the Attorney General finds that the employee acted with malice or in bad faith, no certification is possible. However, lack of subjective good faith is not necessarily equivalent to malice or bad faith. (See Schiff v. Williams, 519 F. 2d 251, 261 (5th Cir. 1975); Faraca v. Clements, 506 F. 2d 358 (5th Cir. 1975); Carter v. Carlson, 447 F. 2d 358 (D.C. Cir. 1971), reversed on other grounds sub-nom District of Columbia v. Carter, 409 U.S. 418 (1973); and related cases.)

Within the limits described above, the Committee finds that the Attorney General should be given broad discretion to determine whether the relevant law and facts warrant certification. Although the courts do have the authority to review the Attorney General's certification, that review should give deference to the Attorney General's determination.[9/] Of course, if the court finds that a certification has been made despite the fact that an employee has violated a clear legal command, the certification cannot withstand review.

7/ Hofstra, supra, at 538.

8/ Wood v. Strickland, 420 U.S. 308, 321 (1975).

9/ See Lemley v. Mitchell, 304 F. Supp. 1271, 1273-74 (D.D.C. 1969); Seiden v. United States, 537 F. 2d 867, 870 (6th Cir. 1976); Thomason v. Sanchez, 398 F. Supp. 500, 504 (D.N.J. 1975).

The bill provides that the certification procedure may not be used with respect to a suit brought against a former employee or against an appointee of the President. This exception is an integral part of the balance which the Committee has struck between the need to protect Federal employees and the need to hold them accountable for their actions. As will be explained below, one weakness of the new disciplinary procedure is that the Civil Service Commission and other agencies responsible for implementing the new procedures have no jurisdiction to discipline either former employees or appointees of the President. Although the disciplinary procedures require the appropriate agency to prepare a written report on whether the former employee or appointee of the President has violated constitutional rights, the Committee finds such a report is inadequate to compensate for granting complete immunity to former employees and appointees of the President.

It is particularly important to assure that appointees of the Presiden be held fully accountable for their actions. As the Supreme Court has said "the greater power of [an official of high rank] affords a greater potential for a regime of lawless conduct." (Economou, supra, at .) Reports prepared by the government hardly can be expected to provide as great a deterrent effect against unlawful conduct as can be provided by the threat of personal liability.

The limitation of the certification procedure to current employees who are not appointees of the President should not, however, nullify the benefits to former employees or appointees provided by this bill. As has been stated above, the vast majority of plaintiffs will choose to bring suit against the United States rather than against the former employee or

appointee of the President. In order to assure that plaintiffs do, in fact, elect to sue the United States in actions involving the conduct of former employees or appointees of the President, the Justice Department should avoid legal maneuvering that will reduce the likelihood that plaintiffs will recovery in Tort Claims Act suits.

The election of remedies provision is, itself, an important adjunct to the certification procedure. Under existing law plaintiffs may bring suit against both the employee and the government for constitutional torts covered by the 1974 amendments. This fact greatly complicates litigation for all parties concerned. For the Department, being joined with an employee as a defendant raises serious conflicts in the Department's ability to represent the employee. It is almost inevitable that the Department's interest in the case will be at variance with that of the employee, thus, requiring retention of private counsel. If plaintiff is able to establish liability, complicated questions may arise regarding apportionment of damages between the defendants. It becomes impossible for the Department to settle meritorious claims.

The election provision of this Bill requires plaintiffs to choose between suit against the employee or against the United States. Once this election of defendants is made, a plaintiff is bound by his choice. Once this election is made, a Federal employee whose conduct is involved will know whether an attempt will be made to hold him personally liable. If a plaintiff chooses to sue the United States, as most plaintiffs will do, the effect is the same as if the Attorney General had used the certification procedure to immunize the employee. When a plaintiff chooses to sue the United States, the Attorney General is relieved of the duty to consider certification.

This Committee has received suggestions that the victims of particularly egregious employee conduct be given the option of proceeding against either the individual employee, as under existing law or against the government under the terms of the bill.[10/] The Committee has rejected a plaintiff election in egregious cases because of the difficulty in defining what would be an egregious case and because a mere allegation of egregious conduct would be sufficient to place the employee under the threat of a lawsuit regardless of the fact that the allegation may later prove to be groundless. Plaintiffs should not be encouraged to allege acts which they may not believe occurred. The certification procedure and election requirement in the Bill provides for greater safeguards for Federal employees while preserving plaintiff's option to bring suit against employees who have not acted with a reasonable good faith belief in the lawfulness of their conduct or within the scope of their authority or against employees who cannot be disciplined for their misconduct.

Although no witness has suggested it, the Committee has considered whether constitutional questions would be raised by limiting Federal and State court jurisdiction over constitutional tort suits against Federal employees. There appears to be little question that Congress can abolish common law rights, especially when an adequate alternative remedy is provided. Cary v. Curtis, 44 U.S. (3 How.) 236 (1845);

10/ See section 6, S. 2868 (95th Cong., 2d Sess.); July 15, 1978 testimony of Pamela S. Horowitz and Alan B. Morrison.

Silver v. Silver, 280 U.S. 117 (1929). There also appears to be little question that under Article III of the Constitution, Congress can regulate Federal court jurisdiction. South Carolina v. Katzenbach, 383 U.S. 301 (1966); Clark v. Gabriel, 393 U.S. 256 (1968).

By substituting the United States for the individual employee defendant, this legislation would deprive plaintiffs of trial by jury,[11/] the opportunity for punitive damages,[12/] and result in a slight reduction in the efficacy of discovery sanctions.[13/] However, the legislation would provide plaintiffs with (a)a more judgment worthy defendant for those constitutional torts recognized by the Bivens cases but not included within the provisions of 28. U.S.C. 2680(h) relating to Tort Claims Act coverage of certain law enforcement torts, (b) liquidated damages, (c) waiver of the employee's personal absolute or qualified immunity, and (d) attorneys' fees and litigation costs.

This Committee believes that from the plaintiff's standpoint the benefits more than outweigh any drawbacks in the legislation. S.3314 is not only sound from a constitutional standpoint, it is sound from a policy standpoint.

11/ 28 U.S.C. 2674.

12/ See also the discussion of retroactivity infra p. .

13/ For example, although Fed.R.Civ.P. 37(b)(2)(iii) permits the entry of a default judgment against a recalcitrant party, Fed.R.Civ.P. 55(e) prohibits the entry of a default judgment against the United States. Plaintiffs would have all available discovery rights against the employee except the right to request admissions and submit interrogatories since these discovery tools apply only to parties. Nevertheless, such tools can be used as the United States as defendant, and the Committee fully expects the Government to take all reasonable steps to gain the cooperation of the employee. Although discovery would not be necessary on the issue of good faith because the defense is waived under the bill, plaintiffs would still be entitled to discovery on the nature and extent of the violation. This information is necessary to establish the appropriate measure of damages.

Because the certification procedure and election requirement will have the effect of immunizing most Federal employees from constitutional tort actions, the Justice Department recognizes that the net effect of the bill might be to reduce the extent to which Federal employees can be held accountable. Most of the constitutional tort suits which have been filed in recent years result from massive and widespread violations of the constitutional rights of citizens. It is the lawlessness of the government that has caused the problems which the Department has with its private counsel program. Many of the employees who have been sued did, in fact, participate in the lawlessness. It would be both ironic and tragic if the principal result of these constitutional violations were to be to give immunity to those responsible. To provide such immunity without establishing alternative mechanisms to hold Federal employees accountable would increase the prospects that such lawlessness will continue or even increase. For this reason, this Bill provides a new disciplinary procedure for Federal employees accused of violating constitutional rights. Without this new disciplinary procedure, the Committee would find the certification procedure and election requirement to be utterly contrary to the public interest.

DISCIPLINARY PROCEEDINGS

To assure that employees relieved of personal liability will be held accountable when they violate constitutional rights, the Committee has adopted a proposal made by the Justice Department to strengthen the disciplinary proceedings of federal agencies. In fact, the Committee finds that subjecting federal employees to personal liability may well be less effective in holding an employee accountable than a thorough agency investigation of his conduct. The proposal set forth in Section 13 of the Bill should provide a deterrent against unlawful conduct at least as effective as the threat of personal liability.

The principal objection to relying on agencies to discipline their own employees is the fact that much of the lawlessness experienced in recent years has involved the highest officers of the government, not overzealous employees in the field. Agencies have disciplined their employees for constitutional torts only after being subjected to intense outside pressure to do so. Any mechanism to strengthen agency disciplinary proceedings must institutionalize such pressure to overcome the natural tendancy of agencies to protect their own from attack.

At the same time, the agency in which an offending employee is employed must be required itself to take the responsibility to discipline its employees. The employing agency should be in the best position to fully understand all the circumstances which determine whether its employee's conduct is proper. It is likely first to become aware of disciplinary problems

in its agency. But most important, the public must be able to hold the officials of each agency accountable for controlling the behavior of its employees. Nothing should be done to reduce the accountability of these officials or to hinder them in their efforts to discipline their employees.

The disciplinary procedure adopted in this Bill balances these two concerns. Basically, it permits aggrieved parties to initiate, participate in, and appeal agency proceedings to discipline federal employees. The employing agency has the responsibility to impose discipline, but the proceeding is appealable by aggrieved parties to an outside agency that can impose greater disciplinary sanctions on the employee. This balance should assure that discipline is, in fact, imposed.

The right of a party to initiate disciplinary proceedings is tied directly to the Tort Claims Act provisions of the Bill. A party may request a disciplinary proceeding only after bringing an action under the Tort Claims Act. This requirement provides a further incentive to plaintiffs to elect to bring tort actions under the Act rather than against the employee in his individual capacity. At the same time it tends to assure that only persons who believe strongly that their rights have been violated are given the right to trigger a disciplinary proceeding. Just as there may be plaintiffs who would bring a tort action against an employee for harrassment purposes, persons might seek to trigger disciplinary proceedings for less than worthwhile purposes.

In order to screen out frivolous requests for disciplinary proceedings, either of two standards must be met. First, a

person may request a disciplinary inquiry after having obtained a monetary recovery in a Tort Claims Act claim. Such a recovery may be obtained at the administrative level or as the result of a suit. The Committee anticipates that most constitutional tort suits will be settled prior to suit, thus vesting in the successful claimants a right to request a disciplinary proceeding. In order not to delay disciplinary proceedings, agencies should take every step to expedite claims based on constitutional torts.

Second, outside parties who have not yet obtained a monetary recovery may, upon expiration of a set period of time, request disciplinary proceedings. This alternative procedure was adopted at the suggestion of the Justice Department to meet criticisms that the first qualification standard might lead to delay in initiating disciplinary proceedings. Certainly it is just as essential for discipline to be imposed as soon as possible as it is that imposition of such discipline be predictable. If an agency does not choose to initiate a disciplinary proceeding, the employee should not be forced to wait until a plaintiff obtains a monetary recovery, which in some cases may take years of litigation. Permitting a plaintiff in a tort suit to request the disciplinary proceeding prior to obtaining a monetary recovery will serve to expedite disciplinary proceedings and relieve employees of uncertainty.

Further, to expedite the initiation of disciplinary proceedings, an agency may invite a person believed to have been adversely affected by the conduct to participate in a disciplinary proceeding it has

initiated against an employee. This provision will eliminate any possibility in delay in initiating a disciplinary proceeding. Without this provision, it would often be necessary for an agency that has taken timely disciplinary action to reopen the matter when a claimant's right to request a disciplinary proceeding finally vests. Even under the "file and wait" provision just discussed, a claimant can take up to two years to file a claim and an agency can take up to six months to process a claim once it is filed before a tort suit can be filed. The Committee recognizes that expediting disciplinary proceedings is in the interest of employees who have committed no constitutional torts and in the interest of agencies desiring to discipline an employee who has committed a constitutional tort. The agency also has an interest in an early dismissal of frivolous claims. For this reason the Bill explicitly recognizes the authority of the agency, after undertaking a preliminary investigation, to dismiss claims which are so unsubstantiated as not to warrant further investigation. In addition, the Bill requires that all claims submitted be subscribed to or affirmed under section 1746 of title 28, which subjects such person to the same liability as if the claim were notarized.

If an aggrieved party has not as yet obtained a monetary recovery or if the agency or a court has not as yet found that a constitutional tort has been committed, the party's rights to seek an administrative or judicial review of the disciplinary proceeding is held in abeyance. Again, the agency may permit the party to seek administrative and judicial review if it wishes to finalize a disciplinary action. The reason for holding a party's appeal rights in abeyance is to avoid appeals in cases in which a constitutional tort has not in fact been committed. Once a party establishes that a constitutional tort was committed, his rights to seek administrative or judicial review vest.

Each of the provisions described strike a balance among the interest of an agency in avoiding frivolous requests for disciplinary proceedings, the need to assure that agencies will impose discipline when appropriate, and the right of an employee to a timely disposition of the matter. These provisions provide flexibility yet will place pressure on an agency to hold the employees accountable for constitutional torts.

Once a disciplinary proceeding is initiated at the request of an aggrieved party, the agency is given great flexibility to conduct the proceeding in an appropriate manner. The Committee has determined that it is not in the interest of the agency or the public to judicialize the proceeding. To do so arguably might give aggrieved parties a greater ability to guarantee that a reluctant agency impose discipline. At the same time, however, requiring a full adjudicatory process prior to the imposition of discipline will enable agency employees to obstruct disciplinary proceedings brought against them. To avoid the latter result the bill requires a hearing only in situations where it is necessary and grants aggrieved persons limited rights of participation.

The agency that employs an individual must be given the initial responsibility to impose discipline. The guarantee that such agency will in fact, exercise this responsibility results from three factors. First, the agency disciplinary proceeding is public. Second, the agency must prepare a statement of findings and explain its actions. Third, the result of the disciplinary proceeding may be appealed.

In terms of the appeals process a balance must again be struck. If a reviewing agency could totally disregard the actions of the employing agency, there would be an incentive for the employing agency to avoid antagonizing its employees and to blame the reviewing agency when it imposes more severe discipline. Giving reviewing agencies power to ignore the findings of the employing agency also could lead employees to disregard the directives of their superiors. Both of these tendencies should be avoided.

At the same time the reviewing agency must have sufficient authority to assure that an employing agency has imposed appropriate discipline. It is equally important that the public be given the impression that the employing agency has not favored the interests of its employees at the expense of the public. Appropriate administrative review is, therefore, just as important when it affirms the judgment of the employing agency as when it overturns it.

The standard of review in an administrative appeal strikes a balance between these considerations. The reviewing agency must rely on the record of the employing agency unless it finds that record inadequate, in which case it may remand the case to the agency or take additional evidence itself. On the basis of this record the reviewing agency may substitute its judgment as to the appropriate nature and degree of discipline. It may not, however, lower the discipline imposed. The Committee expects that normally the reviewing agency will find no need to reach a different conclusion than the employing agency.

In most cases the administrative review will be by the Civil Service Commission. However, because employees of certain agencies are not subject to Civil Service jurisdiction, the Secretary of Defense,

or his designee, will review disciplinary actions against uniformed members of the Armed Forces; the Secretary of State, or his designee, will review actions taken against members of the foreign service; and the Secretary of Health, Education and Welfare will review adverse actions taken against members of the Public Health Service.

Finally, the Bill provides for judicial review of the disciplinary proceeding. The Committee expects that except in extraordinary circumstances an aggrieved party will not seek judicial review, if for no other reason than to do so will enable the employee to seek a dismissal of the charges against him.

As explained above, the disciplinary procedure is not applicable to former employees or appointees of the President. "Appointees of the President" are those whose nominations were subject to Senate confirmation. Neither an employing agency nor any other agency has any jurisdiction to discipline a person who is no longer an employee of the Government. Similarly, no agency has jurisdiction to discipline an appointee of the President. To do so may even conflict with the President's removal power. For this reason the only remedy that an aggrieved party has with respect to a former employee or a Presidential appointee is to request the appropriate agency to prepare a "report" on the conduct of that employee. The Committee has provided a mechanism for the employee and the aggrieved party to seek judicial review of the report. These mechanisms will guarantee that the report is accurate and unbiased. As has been stated above, the limited nature of the

remedies available with respect to a former employee or an appointee do not justify a grant of complete immunity from personal liability. The Committee has, however, adopted the election of remedies approach, which requires an injured party to sue either the presidential appointee or former employee, or the United States for a constitutional tort, but not both.

The Committee is confident that the new disciplinary procedure will be an effective deterrent against lawlessness by Federal officials. The Committee expects that it will provide a more specific deterrent than the threat of personal liability, which deters proper as well as improper conduct. The procedural guarantees will give agencies every incentive to hold their employees accountable. Lawsuits brought after constitutional violations have occurred clearly are a less effective remedy than adequate supervision by the agencies which prevents such violations.

RETROACTIVITY

In the original draft of this Bill, Section 12 would have made the statute applicable to all claims and suits pending as of the date of enactment or filed or accruing thereafter. The constitutionally of this original retroactivity provision proposed by the Justice Department was questioned by several witnesses appearing before this Committee's Subcommittee on Citizens and Shareholders Rights and Remedies. Making the Government the exclusive defendant and foreclosing suit against the individual employee, they argued, would unconstitutionally deprive claimants with pending claims of their Fifth Amendment right to due process by denying them the right to trial by jury and the opportunity to seek punitive damages from the individual defendant.

New legislation can be applied to pending cases unless to do so would occasion some "manifest injustice." Bradley v. United States, 416 U.S. 696, 717 (1974). However, while Congress can extinguish procedural rights in pending cases, the Seventh Amendment right to trial by jury is no mere procedural right. Colgrove v. Battin, 413 U.S. 149 (1975); Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945).

The Department of Justice, in a memorandum prepared by its Office of Legal Counsel, concluded that although the denial of punitive damages to persons with pending claims would not be inconsistent with the Constitution, the retroactive extinguishment of the right to a jury trial could present due process problems.

There is little question that Congress can prospectively limit or condition its waiver of sovereign immunity by denying plaintiffs trial by jury and punitive damages. Reid v. United States, 211 U.S. 529 (1909); Glidden Co. v. Zoanok, 370 U.S. 530, 572 (1962). The Justice Department argues that the appropriateness of punitive damages is a question of public policy not private right, Washington Gas Light Co. v. Lansden, 172 U.S. 534 (1899), Smith v. Hill, 12 Ill.2d. 588, 147 N.E. 2d 321 (1958), and therefore that there be little question that Congress can, by substituting the Government for the individual defendant, retroactively extinguish a claim for punitive damages in a pending case. The Committee, however, prefers to resolve this question in favor of plaintiffs.

In addition, this Committee agrees with the Department of Justice that retroactive denial of trial by jury raises sufficient constitutional question that its inclusion in the Bill's retroactivity provision would be unwise.

Accordingly, we have provided that a plaintiff with a pending or accrued claim can elect a jury trial or can request punitive damages; but if the case is tried to a jury or the plaintiff seeks punitive damages, then the provisions of the Bill relating to liquidated damages, waiver of absolute or qualified immunity, and attorneys fees do not apply. In other words, if the plaintiff wishes to preserve his existing rights to trial by jury or punitive damages, he must also comply with the provisions of existing law relating to liquidated damages, immunities, and attorneys fees. This fact will, the Committee believes, induce most plaintiffs to forego jury trials and punitive damages. It is clear that irrespective of the election of the plaintiff as to the applicable law that the Attorney General may use the certification procedure to substitute the United States as the sole defendant in these pending cases.

The Committee emphasizes that establishment of an effective remedy for constitutional torts has no relationship whatsoever to proposals considered in previous Congresses to limit or abolish the exclusionary rule. In 1971 Senator Lloyd Bentsen proposed a Bill to substitute a tort remedy against the Government in lieu of application of the exclusionary rule. (See S. 2657, 92nd Congress, 1st Session, and Amendment number 790 to S. 2657.) Senator Bentsen's proposal was criticized as a "direct violation of the Constitution" in a Report of the American Bar Association. (See Report No. 4 of the Section of Criminal Law, American Bar Association.) The Report commented that

> There is no assurance that [tort] suits can be successfully brought, or that judges and juries will be inclined to award more than nominal damages. There is the further question of whether the payment by the government of some damages can serve as a deterrent to individual police officers. Given the likelihood of infrequent law suits and insubstantial damages where suits may be brought, Government officials may be willing to pay damages occasionally to gather the fruits of illegal searches and seizures to secure convictions. Id.

For these reasons, in adopting this Bill the Committee gives no support to efforts to limit or abolish the exclusionary rule. In no sense does adoption of this Bill result from or relate to the suggestion of the Chief Justice in his dissenting opinion in Bivens 11/ that a Tort Claims Act remedy replace the exclusionary rule. Accordingly, the Bill provides no mechanism to assure any interdependence between this Bill and invocation of the exclusionary rule.

11/ 403 U.S. at 411-427.